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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

PITT RIVER TRIBE OF INDIANS,

Petitioner,

v.

PACIFIC GAS AND ELECTRIC COMPANY, THE HEARST CORPORATION, KIMBERLY-CLARK CORPORATION, PUBLISHERS FOREST PRODUCTS, DIAMOND INTERNATIONAL COMPANY, FRUIT GROWERS SUPPLY COMPANY, U. S. PLYWOOD CORPORATION, and SOUTHERN PACIFIC LAND COMPANY,

Respondents.

NO. 75-128

PETITION FOR CERTIORARI

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I

These cases were filed in the Superior Court of the State of California, where a general demurrer was sustained on identical grounds (the complaints being, for all practical purposes, identical). A petition for an evidentiary hearing on the question of violation of the First, Fifth and Ninth Amendments to the Constitution was filed. The hearing was denied. The Court of Appeal sustained the judgments on the demurrers and the Supreme Court denied a hearing. The opinion of the Court of Appeal and the record of the Supreme Court's action (December 11, 1975) are contained in the Appendix.

II

Jurisdiction is conferred by 28 U.S.C. 1257.

III

The questions presented for review are:

1. Whether the title of an Indian Tribe, which was not, nor was its land, included in Section 16 of the California Private Land Claims Act, and whose land was not confirmed as a Spanish or Mexican grant under said Act, was extinguished because it failed to file a claim under said Act.

2. Whether, under the same circumstances, title was extinguished despite the fact that the

failure to claim was because of the following: (a) its "guardian", the United States Government, fraudulently failed to notify it of the necessity to file a claim and (b) force and violence, and the threat of force and violence committed, supported and protected by representatives of the State of California and the United States.

3. Whether the complaint states a cause of action under Cramer v. United States, 261 U.S. 219.

4. Whether an Indian Tribe has any recourse to the courts to restore its possession which it was maintaining under the mantle of the fourth proviso of Section 6 of An Act to Provide for the Survey of the Public Lands of California; or it had lost its possession by reason of murder and genocide committed by the patentee in order to be able to obtain a patent on the land in question.

IV

This case involves the First, Fifth and Ninth Amendments to the United States Constitution, the California Private Land Claims Act (9 Stat. 631) and An Act to Provide for the Survey of the Public Lands of California (10 Stat. 244); the statutes being set out in the Appendix.

V

The federal questions were raised and passed upon as follows: (a) in the complaint, by the sustaining of the demurrer, (b) in the petition for a "constitutional fact" hearing, by the refusal of such a hearing, (c) in the oral and written argument, by the sustaining of the demurrer, and (d) in the appeal, through written and oral argumentation, by affirmance of the judgment.

VI

ARGUMENT

BACKGROUND OF THIS LITIGATION:

> "Upon this point a page of history is worth a volume of logic." (Justice Holmes, N.Y. v. Eisner, 256 U.S. 345, 349).

The fundamental policy and law of the United States with reference to Indian land was fixed at the time of the foundation of the Government. It was presented to Congress on behalf of President Washington, was formulated in the Northwest Ordinance, and was enunciated by a long series of Supreme Court decisions.

> "The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent." 1 Stat. 50.

From that time until today Indian land was acquired by the United States Government with such consent (oftentimes a coerced consent, as this Court has pointed out).

The primary method for securing this consent was treaties (until 1871). In 1852 it seemed that the national pattern was to be repeated in California when Congress acceded to the President's request for $25,000 to "treat with California Indians." Sept. 28, 1850, 9 Stat. 558; another $25,000 voted on February 27, 1851, 9 Stat. 572.

Commissioners were appointed who entered into 18 treaties with various purported representatives of Indian Tribes; which treaties were interpreted by the Government as extinguishing Indian Title in all of California (approximately 100 million acres) in exchange for approximately 8 million acres of reservations.

On June 1, 1852, President Fillmore communicated these treaties to the Senate which, on July 8, 1852 refused to ratify them in Executive Session. What followed was rather unprecedented: the Senate ordered them filed under an injunction of secrecy which was not removed until they were accidentally discovered by a Senate clerk in 1905. Not only

were the Indians never notified of the failure to ratify the treaties, but Government representatives hurried them off their land to occupy the reservations. Those that left their land were not permitted to occupy, or at least to continue to occupy the promised reservations.

The question of California treaties was never raised again except when one tribe fought the United States Army sufficiently to a standstill so that they ended up with a treaty and a reservation some years later.

Beginning in 1848, with the discovery of gold, miners, settlers and a large number of unsavory characters began to occupy the State. Because Indians were occupying the "gold" areas and some of the best agricultural land and objected to the intruders destroying their source of food, raping their women and kidnapping their children, there were a large number of physical attacks made on the Indians. A skeletal documentation appears in the Appendix.

The net effect was that an estimated 50,000 to 75,000 Indians either died or were driven out of the State in the first five or six years after

the discovery of gold. The genocide continued, so that by 1871 the remaining Indian population was estimated at a low of 13,000 and a high of 20,000; whereas in 1848 it had been somewhere between 100,000 and 250,000. There is ample documentation, including admissions, about the supporting role of the State and Federal governments in this genocide.

Unlike many Indian Tribes elsewhere in 1850, the California Indians were all on their ancestral land, and each Tribe had its well demarcated territory. By 1870, as a result of the deaths and the scattering of the Indians, only a small proportion of the tribal land was occupied by its owners.

Petitioner Pitt River Tribe was somewhat unique among the California Tribes. Protected by the mountains and hard-to-reach areas, far distant from the centers of population, not in the gold fields, and endowed by nature with ample food and great vigor and strength, the genocidal toll among Pitt River Indians was much less than elsewhere in California.

As a result, the Tribe's Indian occupancy of their former land, while not fully maintained, did continue to a larger extent than anywhere else in

California. Furthermore, their regrouping as a Tribe came earlier and proceeded farther than in the case of any other Tribe.

By 1920 they were already communicating with and sending delegations to the Government in Washington, making demands for land.

With the passage of the Indian Claims Commission Act in 1946, the Tribe filed a Petition. On this Petition the Tribe succeeded in obtaining a Judgment of Liability, at which point the Government urgently sought a settlement. A settlement was worked out without the Tribe's knowledge and against their wishes. They voted the settlement down, but the Indian Claims Commission disagreed and approved the settlement.

Thereafter, the Tribe, hampered because its attorney had turned on it, tried to stop the settlement with pressure on Congress and the Executive and finally, in the main, refused the settlement checks.

Midway in this fight on the settlement the Tribe, feeling frustrated in its efforts, decided upon a tactic of occupying -- more properly reoccupying -- portions of its ancestral land.

It occupied land "belonging" to P.G.&E., The U. S. Forest Service and Lassen National Park. These tactics were met uniformly with the argument that they were illegal, improper and disoriented to success in returning the Tribe's land. The Tribe was strongly urged by the United States Government and P.G.&E. to utilize the courts as the proper legal way to get its land back if it was entitled to do so. Responding to these pressures and arguments, the Tribe brought suit against a number of large corporations which, in total, claimed ownership of at least 500,000 of the Tribe's 3-1/2 million acres.

THE CALIFORNIA PRIVATE LAND CLAIMS ACT, 9 Stat. 631

After the Treaty of Guadalupe Hidalgo, as required not only by the Treaty but also by the law of Nations, the Government was obliged to separate those parts of California in which title was held under Spanish or Mexican law in order to respect such title. The rest of the land would, of course, become part of the public domain. The statutory vehicle adopted in California was somewhat different, in form, than that used in other areas, but the

purpose was the same. In his 1857 Report, the Secretary of the Interior sums up the history and function of the Private Land Claims Statutes:

> "This great inheritance was acquired, first by the voluntary cessions of several of the original thirteen States; then by the Louisiana purchase obtained from Napoleon by the treaty of 1803. The next enlargement of our territory was effected by the treaty of 1819 with Spain, ceding the Floridas to the United States; then its further extension was effected by the treaty of 1848, at Guadalupe Hidalgo, with Mexico, ceding New Mexico and California. Subsequently, Texas accepted the proposition of this Government establishing her boundaries for the 'relinquishment by the said State of all territory claimed by her exterior to said boundaries.' The last accession to the public domain is that, in 1854, from Mexico, known as the 'Gadsden purchase,' covering a surface of 23,161,000 acres, south of the Gila river.
>
> The Supreme Court has said, in reference to acquired lands, that 'the people change their sovereign; their right to property remains unaffected by this change.' Consequently, when the United States succeeded to the ownership of that portion of our territory derived from treaties with foreign Powers, the first and paramount duty in the disposal of the public lands was to separate private from public property.
>
> In obedience to this well-settled principle of public law, and under the especial obligations of treaties, the United States have established boards of commissioners, conferred powers on

registers and receivers, opened the courts of the United States for the adjudication of foreign titles, and in multitudes of cases confirmed such titles by special acts of legislation.

These classes of titles are known under the generic description of 'private land claims,' and are of every species, from minute parcels in the form of lots in Spanish towns to rural claims, ranging in size from one hundred arpents and less to a million and a half acres.

These titles are of British, French, Spanish, and Mexican origin, all depending for validity on the colonial laws of their different sovereigns. ... In the growth of our immense territory, in the way and by the means already mentioned, there remained and still remain unextinguished, the claims, rights, and possession of the aborigines. The General Government of the Union, at the dawn of our political existence, adopted the principle asserted by the colonizing Governments of Europe, to the effect that the absolute title was in the United States, subject only to the Indian right of occupancy, and with the unconditional privilege of extinguishing that right.

Under the operation of these principles, the purchase and extinguishment of the Indian right has been gradually progressing in the ratio in which lands in Indian occupancy were demanded by our people for settlement. Pari passu have the lines of the public surveys been carried, in preparing the way for homesteads, and the means by which to pass to our people unincumbered and indefeasable titles." (Report of Secretary of the Interior, Dec. 3, 1857, Cong. Globe, 35th Cong., 1st Session, App. p. 14).

The Secretary of the Interior was in the key position vis-a-vis California Indians and their land. In his Department were the Commissioner of Indian Affairs and the Commissioner of the General Land Office. In addition, he was the chief administrator of the 1851 Act. It was he who instructed the California Land Commissioners in their duties. It was he who made decisions and reported to Congress on the land, and all other problems, of the California Indians. If anybody entertained the thought, either that the Indian Title was being extinguished or that they were going to be obliged to file claims under the Act, would he not have reported to Congress on developments and problems and progress?

Neither the Secretary of the Interior nor the Commissioner of Indian Affairs mentioned the 1851 Act in their 1851 Report. The only Indian land-related issue reported on in the Secretary's 1852 report was the rejection of the treaties, about which he commented merely that it was up to the Senate to announce policy as to future negotiations, or up to Congress "as to removal from California and to provide them some place of

refuge" (Cong. Globe, Vol. 28, 32nd Cong., p. 17).

Neither in 1852, 1853, 1854 nor any of the years following was the 1851 Act or extinguishment of Indian Title mentioned except in the 1857 Report.

Is it not judge-made law that the construction of a statute by the department charged with its administration has "very great force and generally a controlling one in the formation of the judgment of this Court."? St. Paul Railway v. Phelps, 137 U.S. 528.

The perspective of the Congress in adopting the California Private Land Claims Act (referred to as the 1851 Act) was no different than the just-quoted statement of the Secretary of the Interior. That is to say, Congress never intended Indian Title to be extinguished by the Act, except to the extent that it was necessary in order to confirm individual Spanish or Mexican grants. This can be conclusively established in a number of ways.

First, Congress knew that the Indians possessed Indian Title to almost all of California in 1851, which is why they voted the money "to treat with the California Indians." They also

knew, as appears in the statutory history, that this Indian land included the most productive gold-mining areas. In fact, those areas swarmed (to use a Congressional expression) with Indians. Analysis of the 100,000-150,000 words (comprising the discussion on the floor of the Senate on the 1851 Act) will show that not a single Senator raised a single question as to (1) what would happen if the Indians put in claims especially in the gold-mining areas, or (2) if this would serve to extinguish Indian Title, was it consistent with overall national policy. (See Congressional Globe, 31st Congress, 2nd Session, pp. 157-160, 284, 347-352, 359-365, 371-378, 387-391, 403-408, 426-430, 438-439, 451).

Second, the tried and true method selected by Congress to extinguish the Indian Title of California Indians -- the treaty method -- was diametrically opposed to any requirement of claim-filing by Indians under the 1851 Act. In Heaven's name, what purpose would be served by requiring Indians (assuming that they knew about the Act and could comply with it) to file claims for land which they had just divested themselves

of by signing a treaty?

The Act of March 3, 1853, An Act to Provide for the Survey of the Public Lands of California (referred to as the 1853 Act) was a package with the 1851 Act. The first would separate off the public domain land; the second would distribute it, by preemption. The following quotation from the statutory history of the 1853 Act shows conclusively that Congress did not intend the extinguishment of Indian Title, or to drive the Indians off their land (excluding the areas of the grants and the area covered by Section 16 of the 1851 Act). Mr. Gwin is Senator Gwin of California who, as the only California Senator functioning at the time, carried the complete load of passing the 1851 and the 1853 Acts.

We quote the discussion from the Congressional Globe, Vol. 24, Part 3, pp. 1772-3:

> "Mr. FELCH. I wish to offer an additional proviso to the sixth section.
>
> The amendment was read, as follows:
>
> And provided further, That this act shall not be construed to authorize any settlements to be made in any tract of country in the occupation of any Indian tribes, or to grant preemption right to the same.

Mr. GWIN. The rights of the Indians to territory in California are merely possessory; I would like to learn from the Senator from Michigan whether this would have any reference to certain settlements made by the Board of Indian Commissioners under treaties which they made and which, perhaps, it is not improper to say were not confirmed by the Senate. They had been placed on portions of the public land they did not occupy before. I am quite willing to concede that these Indians have possessory rights if they had them when the country came into the possession of the United States, when they occupy the same locations, but there are at present very few of them in the agricultural districts. Those who are located in the agricultural districts are chiefly at the mission stations. I believe there were at one time some thirty thousand Indians in the various missions in California. There are some few Indian villages on the Sacramento and other rivers. There is one on Captain Sutter's possessions. But they are diminishing every year, and I am not anxious to disturb them in their possessions, but am also unwilling to acknowledge any right of soil in these tribes. Let them remain at the villages they now occupy, and confine the operation of the proviso to that object, and I will not oppose it.

* * *

Mr. FELCH. My object in offering this amendment is certainly not to embarrass any of the settlers of California. A suggestion was made by the Senator from Virginia, that we might possibly, in legislating on this matter, be interfering with some of the rights of the Indians of that country. The truth is, that we have little actual knowledge on the subject of the Indian tribes in that country. Offi-

cially, we have none, for I believe we have no treaties that ever were made with any of them. It is, however, understood that a large portion of the country occupied by the whites is relieved of the original inhabitants. Still I understand that there are portions of the country to which the Indians have retired -- perhaps mineral portions -- and which they are occupying to a considerable extent. My object was to avoid the possibility of white people going among the Indians and making settlements, and claiming that the United States had given sanction to it by this law in opposition to the rights of the Indians. The way to get rid of the Indians is not by sending white men to claim rights among them. It is to form treaties with them, as the Government has heretofore done, according to the provisions of the Constitution. Although this bill is intended to provide for those settlers who are now there, and those who may go there within a limited time, I think we should endeavor to keep it free from all embarrassments of the kind to which I have alluded. I therefore apprehend, that while this proviso will not interfere with any settlements made there, because the settlements will be made where there are no Indians, yet I think it is a safeguard which is due to the Indian themselves, and which we ought to throw around their rights. I do not apprehend that this proviso will embarrass anybody; but, on the other hand, it seems to me to be quite proper that we should give the Indian that security which I desire to give him by this proviso.

Mr. GWIN: I shall not oppose it. I do not think it will have any particular bearing any way."

In this case Congress was following a pattern, set many years before, of providing a reservation in public lands disposal statutes of lands either in the possession or occupation of Indians, or lands to which the Indian Title had not been extinguished. By incorporating the 1841 Act into the 1853 Act Congress made doubly sure that Indians would be protected.

Had there been this disproved intention on the part of Congress to remove the Indians from their land and scatter them, this would have been an arrant violation of the provision of the Treaty of Hidalgo (1848) which provided:

> "And finally, the sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for it's [sic] being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place it's [sic] Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain."

Probably the most conclusive proof that nobody at the time believed that the Indians were required to file claims at the risk of losing their Indian Title is the fact that the arch-enemy of the Indians, the main mover behind the rejection of the treaties,

the main mover behind the genocide against the Indians, the mover of a resolution which called for the removal of all Indians from the state -- the State Legislature -- instead of being overjoyed at the failure of Indians to file under the 1851 Act, in 1856 adopted a resolution directed to Congress requesting the extinguishment of Indian Title in California.

> "Senate concurred with the Assembly resolution requesting the California Senator and Representatives in Congress to urge upon Congress the necessity of immediate action to provide some means for extinguishment of Indian Land Titles to lands in California." (Senate Journal, 1856, p. 598)

The pellucidity of Congressional intention explains why, as late as 1924, the Solicitor General and the Attorney General of the United States vehemently and passionately argued to the Supreme Court that the 1851 Act did not require claim-filing by Indians to avoid extinguishment of their Indian Title. See United States v. Title Insurance Company, 265 U.S. 472. As an examination of the Government Briefs in Cramer v. United States, 261 U.S. 219, will demonstrate, there, too, the Government fought for the principle that the 1851 Act

did not and could not extinguish Indian Title.

Considering the cost to the Government of an extinguishment of Indian Title in California, their stick-to-itiveness in arguing non-extinguishment by the 1851 Act is conclusive proof that that is exactly what Congress intended.

The Court below bases its affirmance on the proposition that, as a matter of law, and irrespective of the special facts involved, every California Indian tribe lost its Indian Title if it did not file a claim under the 1851 Act. For this proposition it cites Barker v. Harvey, 181 U.S. 481, U. S. v. Title Insurance Co., 265 U.S. 472 and Super v. Work, 3 F (2d) 90, aff'd. 271 U.S. 643.

In order to avoid undue length, and to profit by the research, logic and passion of the Government (a very interested party), we will use their Title Insurance Brief, by reference, to help argue that the state of the law and the details of the 1851 Act demonstrate its non-applicability to Indian Title. The Brief states the well-known proposition that Indian Title will be extinguished by the United States only with the consent of the Indians. Furthermore, such Title will be considered extinguished only when such purpose is clearly indicated. Missouri v. Roberts, 150 U.S. 114-118; Leavenworth v. U.S., 92 U.S. 733, 742; U.S. v. Winans, 198 U.S. 371, 382.

The Brief points out several aspects of the Act which demonstrate the impracticability, if not the impossibility of Indian claims. For example: (1) the

Act was administered only in the Spanish and English languages; (2) the Act speaks in terms such as documentary evidence and deraignment of claims title, etc.; (3) issuing a patent to the successful claimant is an unheard of procedure for Indian Title, because it does not produce Indian Title but an entirely different kind of title, patent or fee title.

The Brief refers to the April 22, 1850 California law which provides:

> "Persons and proprietors of lands on which Indians are residing, shall permit such Indians peacefully to reside on such lands unmolested in the pursuit of their usual avocations for the maintenance of themselves and their families."

This law was obviously known to Congress, which obviously did not intend to undercut it.

The Brief further points out the contradiction between the treaty negotiations and the idea that a claim had to be filed under the 1851 Act; referring to the fact that $25,000 was voted for treaty negotiation four days before the 1851 Act was passed.

The Brief quotes from the 1853 Act:

> "This Act shall not be construed to authorize any settlement to be made on any Tract of Land in the occupation or possession of any Indian Tribe, or to grant any preemption right to the same."

and notes that this provision contradicts the idea

that the Indians would lose their title by not filing, as well as the suggestion of Barker that Indian Title and public domain are mutually exclusive.

The main argument of the Brief is the fundamental one that Indian Title was not derived from the Spanish or Mexican government, but had existed independent of such governments.

In addition to the arguments made in the Brief we have some of our own to add.

Examination of the hundred or more decisions of the Supreme Court applying this Act produces a certainty that the Supreme Court never would have been willing to confirm Indian Title. The Court's standards are based upon the assumption that only formal grants, meticulously proved, could establish confirmable title. See U.S. v. Cambuston, 61 U.S. 59, U.S. v. Castro, 65 U.S. 346, Luco v. U.S., 64 U.S. 515, U.S. v. Vallejo, 66 U.S. 541, U.S. v. Castilere, 67 U.S. 17.

Somewhat similar to Indian Title on its facts is U.S. v. DeHaro, 92 U.S. 599, which held non-confirmable a license, or provisional grant or terminable right of occupancy.

Almost conclusive is the evidence that, except for the Mission, "civilized" agricultural or pueblo Indians, the law of Mexico did not recognize any title or property rights in the Indians. William Carey Jones was delegated by the Secretary of State and the Interior, to inquire into the law of Mexico, including Indian rights. His report, which was received in 1850 and transmitted to the Congress, states:

> "(Made in Pursuance of Instructions From the Secretary of State and the Secretary of the Interior, by William Carey Jones)
>
> (Senate Ex. Doc. 18, 31st Cong., 2d Sess., Cong. Doc. Series 589)
>
> I am also instructed to make 'an inquiry into the nature of the Indian rights (in the soil) under the Spanish and Mexican governments.'
>
> It is a principle constantly laid down in the Spanish colonial laws, that the Indians shall have a right to as much land as they need for their habitations, for tillage, and for the pasturage of their flocks. When they were already partially settled in communities, sufficient of the land which they occupied was secured them for those purposes. If they were wild and scattered in the mountains and wildernesses, the policy of the law, and the instructions impressed on the authorities of the distant provinces, was to reduce them, establish them in villages, convert them to Christianity, and instruct them in useful employment. California was not excepted from the operations of this rule. It was for this purpose especially that the missions were founded and encouraged. The instructions, heretofore quoted,

> given to the commandant of upper California in August, 1773, enjoin on that functionary that 'the reduction of the Indians in population as the spiritual conquests advance, shall be one of his principal cares;' that, the reduction made, 'and as rapidly as it proceeds, it is important for their preservation and augmentation to congregate them in mission settlements, in order that they may be civilized and led to a rational life; which (adds the instructions) is impossible if they be left to live dispersed in the mountains' (p. 32).
>
> * * *
>
> "In the wild or wandering tribes, the Spanish law does not recognize any title whatever to the soil (p. 34)."

For a reference to Jones' authorization and competence see U.S. v. Vallejo, 66 U.S. at 552.

Were Indian Title confirmable, it is inconceivable that they could be confirmed without Indian testimony and Indians would have been disqualified from testifying before the Commission or the District Court. California statutes forbade testimony by Indians. (1850 Cal. Stat. 230, 1851 Cal. Stat. 114, 1854 Cal. Stat. 67, 1861 Cal. State. 522, 1863 Cal. Stat. 60, 69). Presumably California rules of evidence would cover 1851 Act proceedings.

A decision under the 1851 Act, U. S. v. Sutter, 62 U.S. 170, on an evidence question cites Patterson v. Wynn, 30 U.S. 232. Referring to Patterson we find Justice Story applying the evidence law of Georgia to a case tried in a federal court within Georgia.

If Indians had to file to keep from losing their land then, having proved their Indian Title, under the provisions of the Act either they got a patent (fee) or else they got nothing. If they got nothing, presumably their Title was extinguished. If they got a patent, they got what all California Indians would have considered unacceptable. They were substituting the common ownership of land for individual proprietorship: and they were substituting land that could be lost for land that could not be lost.

Assume, arguendo, that this Court concludes Petitioner was required to file under the 1851 Act. We then submit to the Court some hard questions.

1. What if the Tribe did not file its claim because its "guardian" fraudulently, or perhaps only negligently, failed to advise it of the passage of the statute and the necessity of filing a claim?

2. What if the Government fraudulently, or perhaps only negligently, failed to advise the Tribe that the treaties had not been ratified, so that claims now had to be filed or else Indian Title was lost?

3. What if, because of violence which was financed and assisted by the State or Federal Government, the Tribe was unable to file and prosecute a claim?

4. What if, because of the genocide financed and assisted by the State or Federal Government, the Tribe was unable to file or prosecute its claim because the tribal leadership had been killed or driven off the land?

5. What if the loss of the land meant to the Tribe an almost complete destruction of the Tribe's culture, religon and economy?

6. What if the loss of the land upon which the Tribe was completely dependent for food and sustenance resulted in the death of a great majority of members of the Tribe since, until 1875, only a white man could obtain public land; and for long after that then only an Indian who had separated himself from his Tribe?

The facts suggested by these hard questions Plaintiff was prepared to prove either at the trial or at the "constitutional fact" hearing it requested. Since the demurrer admits what is in the complaint, and a refused hearing admits what was offered to be proved,

this Court must assume these facts to be true in disposing of this case.

We submit as exquisitely apposite, the discussion in Carino v. The Insular Government, 212 U.S. 449.

The Court below relies on Barker and Title Insurance. We have no quarrel with their holdings if they are limited to their special facts, which means that they are limited to cases where grants were confirmed, or to lands and Indians described in Section 16 of the Act.

Such a reading is required to integrate them with Cramer. Since Title Insurance followed closely on Cramer, and the Court was the same except for one Justice, and both decisions were unanimous, such an integration seems warranted.

The losing party, the railroad, fought gamely to convince the Cramer Court that the Indians (who were not on grant land and did not at all meet the Section 16 specifications) were obliged to file claims and their title was extinguished for lack of filing. If one will carefully examine the Court's opinion it will appear that the Court did not take the easy way out -- that the Indians were not on the

land at the time the 1851 Act was passed. As a matter of fact, the record shows that the U. S. Attorney was claiming a pre-1851, in fact, a from-time-immemorial occupancy. Perhaps this is why the Court did not avoid the issue. But more likely is that the Court was trying to avoid the reductio ad absurdum the railroad was trying to push it into.

If it recognized a quasi-Indian Title in Indians who moved on to the land on March 4, 1853 how could they be better situated than Indians who were on the land on March 3, 1851 and continued to live on it? Or would it be argued that Indians would be forced to leave their ancestral lands for a year or two, and then return to get the benefit of Cramer -- just the opposite of what Cramer said it was trying to accomplish.

Another reason why the Cramer Court avoided the pitfall of declaring Indian Title extinguished was because it read the statute carefully and noted that the word "extinguished" is not used in the statute. The only effect of not filing a claim on land where no grant was confirmed was that such land went into the public domain, to be disposed of as the 1853 Act provided, or as Congress should later decide. The Court knew that Indian Title was not inconsistent

with being in the public domain, as a reading of the 1853 Act demonstrates, and as was held in Missionary Society v. Dallas, 107 U.S. 336, 344; Buttz v. Northern Pacific, 119 U.S. 55, 70; St. Paul v. Phelps, 137 U.S. 528, 541.

Interpreting Barker and Title Insurance as we have done does not in any way limit the effectuation of the one and only purpose of the 1851 Act. That purpose was to determine which were the valid Spanish and Mexican grants. It was not to find out where Indian Title ran. The Government had better ways to determine where Indian Title lay -- in fact, the Commission never could have made a proper determination of this question.

If Barker and Title Insurance had actually purported to go beyond the facts of their case to a case like Cramer, or like ours, it would be dicta, pure and simple. For a determination, in Barker and Title Insurance, as to what going into the public domain does to Indian Title, was meaningless. The land of those Indians was not going into the public domain.

We disagree with the Government that Indians did not have to file claims on the Title Insurance facts. Having studied the factual situation in Barker and

Title Insurance, realizing that Mexican grants and Indian Title on the grant lands got all mixed up together -- sometimes the Indian Title, or protection or easement was even written into the grant, [1] on at least one occasion an Indian was given a grant (U. S. v. Ritchie, 58 U.S. 525), we can understand why the Court felt the Indians should have been before the Commission when the decision was being made. Leave aside whether any Indian tribe had any chance of ending up with a patent, or a condition attached to a patent, the Court was not unreasonable in saying that the Indian Title "derived from the Mexican Government." How could it be denied, if the grant provided for it, in so many words?

It must be that Congress, equipped with a knowledge of Mexican law by Jones' Report, foresaw how matters would develop on this issue. Realistically anticipating the possibility that the Indians would end up out in the cold, they enacted Section 16 so Congress could be informed of which Indians were out in the cold, and, perhaps, do something about it.

Petitioner Tribe was about as far removed as was possible, geographically, socially and in every

---

1/ Also see U.S. v. Arrendondo, 6 Pet. 691, 693; U.S. v. Armijo, 5 Wall. 444, 447.

way from the Section 16 categories. Therefore a "rule of property" in its favor was established by Cramer, if it was not clearly established already by the long line of Supreme Court decisions protecting Indian land from taking without Indian consent.

The theory of a "rule of property" is that it protects the buyer who, presumably, hears about and relies upon a series of court decisions. Faced with the inability of a preemption to occupy land already occupied or possessed by an Indian (1853 Act) it would take a lot of gall for a preemptor to assert that he relied upon Barker or Title Insurance, but not Cramer.

We asserted in our complaint, and again in our Petition for a "constitutional fact" hearing that the impact of the taking of Pitt River land violated the First, Fifth and Ninth Amendments because of its effect on the religion, culture, economy and health and even lives of the tribal members. Candor requires us to admit that no act or series of acts or statute having to do with deprivation of Indians of their land has reached the degree of horrendousness required to reach constitutional proportions. We believe we have such a situation here in the almost complete obliteration of a religion, a culture, and

-- to a lesser extent, though still substantial -- of a people.

As Jane Addams once said, "When if not now; who if not you."

But, if this Court does not choose to give constitutional significance to the sad saga of the Pitt River Tribe and the California Indians, at least it should adopt a statutory interpretation which would avoid constitutional problems.

CRAMER CAUSE OF ACTION

This litigation is keyed, of course, to the question of whether Pitt River Indian Title was extinguished, but it is, of course, on several levels. Level two is the cause of action founded upon the Cramer decision.

While couched in language which suggests merely a ruling on a special demurrer, which it is not, the decision of Court of Appeal actually is a declaration that turns Cramer into a dead letter. The Court says the allegations constitute "no more than a conclusion of law." How can this be? Is the allegation that Petitioner "occupied" certain specific land a conclusion of law? Why, you may ask, was the complaint couched in such terms?

The answer is that if one were pleading a libel, it would be simple -- follow the words of the statute.

He made a publication. It was false. He intended to defraud. I relied upon it. I was damaged thereby. But, what are the necessary allegations on a Cramer cause of action? Can anybody read Cramer and say whether occupation (or possession, if they differ in meaning) is enough? One could reason from the Land Decisions the Court cites that occupying at least with "improvements of any value whatever" is enough (3 L.D. 371). Incidentally, this language comes from the original General Land Office circular which was first issued in 1884 and spawned a progeny of follow up Circulars and Land Office decisions protecting Indian occupancy.

What complicated the pleading problem was that in the case of certain defendants there are ten, twenty or perhaps as many as fifty different areas where Cramer occupations are claimed. Putting the historical facts together so as to allege length of occupation, buildings, fencing, etc. would be a difficult, if not impossible task. Such a task is never imposed on a litigant in advance of his pleading, and it is imposed in addition to the amorphous standard established by Cramer.

What safer method of pleading could there be than to say whatever you require in Cramer we plead. Is

the law just a highly intellectualized guessing game? For example, Cramer found occupation since 1859, a fence, a dwelling house and divers out-buildings. Does this mean that without a fence, or with only a five-year occupancy no cause of action is stated? Does this mean that Indians trying to take advantage of Cramer must run a "law and motion" obstacle race, with lawyers filing briefs on such questions as whether a lean-to is enough, or whether an Indian must spend all year, instead of a few months, to get Cramer protection? Obviously these are questions for the trial court, in which the Indian will describe his tribe's particular life style and it will, hopefully, not be forced into a procustean bed, as the Court of Appeal is trying to do with Petitioner at the law and motion stage.

We note that even in criminal cases, where there are important constitutional reasons for specificity, pleadings in the words of a statute are sufficient. Though this Court has not yet spoken, such a practice has been approved by Kaneshiro v. U.S., 445 F (2d) 1266; U. S. v. Mixon, 374 F (2d) 20; U. S. v. Roberts, 296 F (2d) 198; Stein v. U. S., 313 F (2d) 518; Davis v. U. S., 253 F (2d) 24.

Is this not the kind of problem which cries out for "the superior justice which looks only to the substance of the right, without regard to the technical rules"? Choctaw Nation v. United States, 119 U.S. 1. Also see Jones v. Meehan, 175 U.S. 1.

1853 ACT CAUSE OF ACTION

We now step down to the third step, a cause of action founded upon the fourth proviso of Section 6 of the 1853 Act, based upon the protection from pre-emption of "land in the occupation or possession of any Indian Tribe." The cause of action which the Court rejects reads as follows:

> "The patents, if any, from the United States Government to defendants' predecessor covering Kimberly-Clark Claim were void for violation of Section 6 of the Act of March 3, 1853 either because the land was occupied at the time of the patent by plaintiff, or such occupation was ended by murder and genocide committed by the patentee in order to be able to receive the patent to the land in question. (Ninth Cause of Action).

Read as broadly as it must be, after demurrer, this is an allegation not only that Petitioner was occupying the land, but that defendants' predecessors had full knowledge of it, defrauded Petitioner and the Government in securing a patent to which they were not entitled, and used violence up to the point of murder in order to be able to obtain the patent.

In the face of an allegation such as this, the Court below concluded that Petitioner does not show sufficient interest or entitlement! The Court then goes on to suggest that the only remedy, if any, would be a suit brought by the Government to recover or set aside the patent. This simply is not the law in any respect. There are circumstances in which only the Government can sue to set aside a patent, but this does not apply to all situations. Moreoever, the remedy of the injured person is not limited to setting aside the patent. The Court can order the patentee to hold the patent in trust for the other party, or in abeyance until the other party has a chance to perfect his claim. Furthermore, it is well established that in many situations, though not all, an attack on a patent can be used defensively or offensively in an ejectment proceeding. Finally, it should be pointed out that most of the cases which limit action against the patentee are cases where the claim is simply that a mistake has been made. Almost never do these cases involve the issuance of a patent which is void because the land has been reserved (as in this case); and never in a case where the patent was procured by fraud. A few of the relevant cases are: Duluth Iron

Range v. Roy, 173 U.S. 587; Wright v. Roseberry, 121 U.S. 488; Doolan v. Carr, 125 U.S. 618; United States v. Beebe, 127 U.S. 338; Hedrick v. Atchison, Topeka, 167 U.S. 673; Kessell v. St. Louis, 59 U.S. 19; Johnson v. Towsley, 13 Wall. 72; Bagnell v. Broderick, 13 Pet. 436. Also see 5 Op. Atty. Gen. 7; 4 Op. Atty. Gen. 558; 1 Op. Atty. Gen. 458.

Respectfully submitted

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

Supreme Court, U. S.
FILED
MAR 10 1976
MICHAEL RODAK, JR., CLERK

PITT RIVER TRIBE OF INDIANS,

Petitioner,

v.

PACIFIC GAS AND ELECTRIC COMPANY, THE HEARST CORPORATION, KIMBERLY-CLARK CORPORATION, PUBLISHERS FOREST PRODUCTS, DIAMOND INTERNATIONAL COMPANY, FRUIT GROWERS SUPPLY COMPANY, U. S. PLYWOOD CORPORATION, and SOUTHERN PACIFIC LAND COMPANY,

Respondents.

No. 75-1286

PETITION FOR CERTIORARI

APPENDICES

AUBREY GROSSMAN
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San Francisco, CA 94103

Attorney for Petitioner

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APPENDIX A

GROSSMAN, ACKERMAN & PETERS
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Attorney for Plaintiff

In the Superior Court of the State of California, in and for the County of Shasta

PITT RIVER TRIBE OF INDIANS, Plaintiff, vs. KIMBERLY-CLARK COMPANY, Defendant.	No. 43317 SECOND AMENDED COMPLAINT

PLAINTIFF COMPLAINS OF DEFENDANT AND FOR A FIRST CAUSE OF ACTION (FOR RECOVERY OF REAL PROPERTY) ALLEGES:

I

Pitt River Tribe of Indians, from time immemorial was and is the owner, and is seized and possessed, of certain land in Shasta, Modoc, Lassen and Siskiyou Counties, the boundaries of which are

set out in Finding 25 of the Judgment of the Indian Claims Commission in The Pitt River Indians v. United States of America (No. 347), reported at 7 Indian Claims Commission Reports, 845, 846, 847. Said land will be referred to hereafter as Pitt River land.

II

At various times between 1850 and 1972 inclusive defendant physically removed plaintiff and its members from Pitt River land, physically prevented them from returning and still withholds possession from them.

III

That portion of Pitt River land from which defendant removed plaintiff will be called Kimberly-Clark Claim.

FOR A SECOND CAUSE OF ACTION (QUIET TITLE) PLAINTIFF ALLEGES:

I

Incorporate the First Cause of Action.

II

Defendant claims an interest in Kimberly-

Clark Claim adverse to that of plaintiff, and said claim is without any right whatsoever; and the said defendant has no estate, right, title or interest whatsoever in said land or any part thereof.

FOR A THIRD CAUSE OF ACTION (TRESPASS), PLAINTIFF ALLEGES:

I

Incorporate the First Cause of Action.

II

At various times between 1850 and 1972 inclusive defendants' predecessors in a claim of ownership and defendant entered upon Pitt River land, and unlawfully cut down trees, dammed and diverted rivers and killed many fish and animals.

FOR A FOURTH CAUSE OF ACTION (DECLARATORY RELIEF) PLAINTIFF ALLEGES:

I

Incorporate the First Cause of Action.

II

Plaintiff and defendant each claim Kimberly-

Clark Claim; consequently an actual controversy exists between them.

FOR A FIFTH CAUSE OF ACTION (ENFORCING PUBLIC POLICY) PLAINTIFF ALLEGES:

I

Incorporate the First Cause of Action.

II

Ever since 1787, the policy of the United States Government - the Congress, the Courts and the Executive - has been that no Indian land would or will be taken without the consent of the Indian Tribe or group having title or rights in such land. This principle was clearly violated when Pitt River land was taken physically and (purportedly) legally at various times between 1850 and date, in that the Pitt River Tribe never gave its consent to the taking of any of its land.

FOR A SIXTH CAUSE OF ACTION PLAINTIFF ALLEGES:

I

Incorporate the First, Second, Third, Fourth and Fifth Causes of Action.

II

Plaintiff denies that the title alleged in Paragraph I of the First Cause of Action was lost by operation of the statutes of March 3, 1851, and March 3, 1853. If the title was so lost its taking deprived plaintiff of its rights under the First, Fifth and Ninth Amendments to the United States Constitution and the Treaty of Guadalupe-Hidalgo.

FOR A SEVENTH CAUSE OF ACTION, PLAINTIFF ALLEGES:

I

Incorporate the First, Second, Third, Fourth and Fifth Causes of Action.

II

Plaintiff denies that failure of plaintiff to file a claim under the Statute of March 3, 1851, deprived plaintiff of its title alleged under Paragraph I of the First Cause of Action because by genocidal acts of the Federal and State Governments and by white settlers the plaintiff was forcibly prevented from filing such claims.

FOR AN EIGHTH CAUSE OF ACTION PLAINTIFF ALLEGES:

I

Incorporate the First, Second, Third, Fourth and Fifth Causes of Action.

II

Plaintiff denies that failure of plaintiff to file a claim under the Statute of March 3, 1851, deprived plaintiff of its title alleged under Paragraph I of the First Cause of Action because its guardian, the United States Government, defrauded plaintiff into the belief that the negotiation of the 18 California Treaties made the filing of a claim unnecessary and impossible.

FOR A NINTH CAUSE OF ACTION PLAINTIFF ALLEGES:

I

Incorporate the First, Second, Third, Fourth and Fifth Causes of Action, except Paragraph I of the First Cause of Action.

II

The patents, if any, from the United States Government to defendants' predecessor covering Kimberly CLark Claim were void for violation of section 6 of the Act of March 3, 1853 either because the land was occupied at the time of the patent by plaintiff, or such occupation was ended by murder and genocide committed by the patentee in order to be able to receive the patent to the land in question.

III

The said patents being invald the land in question remained in the public domain. Plaintiff had and has a right to occupy and use land in the public domain and defendant does not.

FOR A TENTH CAUSE OF ACTION PLAINTIFF ALLEGES:

I

Incorporate the First, Second, Third, Fourth and Fifth Causes of Action except for Paragraph I of the First Cause of Action.

II

After March 3, 1853, while Pitt River land was part of the public domain, plaintiff occupied it and acquired title under the principle enunciated in Cramer v. United States, 261 U.S. 219.

FOR AN ELEVENTH CAUSE OF ACTION PLAINTIFF ALLEGES:

I

Incorporate the First, Second, Third, Fourth and Fifth Causes of Action except Paragraph I of the First Cause of Action.

II

After March 3, 1853, plaintiff acquired title to Pitt River land by adverse possession.

FOR A TWELFTH CAUSE OF ACTION PLAINTIFF ALLEGES:

I

Incorporate the First, Second, Third, Fourth and Fifth Causes of Action except Paragraph I of the First Cause of Action.

II

The patents to defendant's predecessors in title relating to Pitt River land were obtained by fraud practiced by said predecessors on the United States Government. Consequently said patents were and are void and the land in question remained in the public domain. Plaintiff had, and has, a right to occupy and use land in the public domain and defendant did not and does not.

FOR A THIRTEENTH CAUSE OF ACTION PLAINTIFF ALLEGES:

I

Incorporate the First, Second, Third, Fourth and Fifth Causes of Action except for Paragraph I of the First Cause of Action.

II

The patents to defendant's predecessors in title relating to Pitt River land were void because they were issued contrary to the conditions established in the statutes authorizing their issuance. Consequently the land remained in the public

domain. Plaintiff had, and has, a right to occupy and use land in the public domain and defendant did not and does not.

FOR A FOURTEENTH CAUSE OF ACTION PLAINTIFF ALLEGES:

I

Plaintiff denies that it lost the title to Pitt River land by operation of the Statutes of March 3, 1851 and March 3, 1853, but if it was so lost plaintiff retained the right to fish, hunt, gather food and cut trees on said land. Defendant has prevented, and still does prevent plaintiff from exercising said rights.

WHEREFORE, plaintiff prays judgment as follows:

1. Declaration that plaintiff owns Kimberly-Clark Claim and defendant has no right, title or interest therein.

2. Restoring plaintiff to possession of said land.

3. Defendant restore said land to its

condition as it was prior to plaintiff's ouster.

4. Damages to compensate for damage done to said land.

5. Recovery of profits made by defendant out of the land.

OR IN THE ALTERNATIVE

1. The land be declared part of the public domain.

2. Declaration of the right of plaintiff to fish, hunt, gather food and cut trees on said land

_____

Attorney for Plaintiff

APPENDIX B

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Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SHASTA

PITT RIVER TRIBE OF INDIANS, Plaintiffs, vs. PACIFIC GAS & ELECTRIC CO., THE HEARST CORPORATION, KIMBERLY-CLARK CORPORATION, PUBLISHERS FOREST PRODUCTS, DIAMOND INTERNATIONAL COMPANY, FRUIT GROWERS SUPPLY COMPANY, U. S. PLYWOOD CORPORATION, SOUTHERN PACIFIC LAND COMPANY, Defendants.	) Numbers 43237, 43298, 43318, 43319, 43321, 43577, and 44640)) PETITION OR MOTION FOR AN EVIDENTIARY HEARING ON THE QUESTION OF VIOLATION OF THE FIRST FIFTH AND NINTH AMENDMENTS TO THE CONSTITUTION

It is the claim of plaintiff that if its land was taken by the Statutes of 1851 and 1853, there has been a violation of the First, Fifth and Ninth Amendments to the Constitution.

In particular, we are prepared to prove the following thesis. Land is an integral part of the religion of the Indians. It is as indispensable to the Indian religion as The Supreme Being is to the Christian religion. Not only can we prove this as to land in general but also we can prove that this particular land, being the ancestral land of the Pitt River Tribe, is indispensable to the religion of the Pitt River Tribe. We are prepared to prove even more specifically that there are a number of areas within Pitt River Territory which have a very special, very unique and very deep religious significance. If an

analogy is appropriate, these areas are like churches to the Christians and synagogues to the Jews or mosques to the Moslems; but even more, they are to the Pitt River Tribe more like the important churches, such as the Mormon Tabernacle or certain buildings in Palestine.

We can prove that the taking of Pitt River Land in 1853 resulted and results in a virtual inhibition of the practice of plaintiffs' religion, as great, if not greater, than the inhibition recognized by the Supreme Court of California in People v. Woody, 61 Cal.2d 716, 722.

If it be argued, and it will be, that there was some compelling national interest (see Woody61 Cal.2d at 722) which justified the taking, then we contend, and are prepared to prove, that the facts rebut this contention. We are prepared to prove that there was no compelling reason for taking

Pitt River Land, or in fact for taking any Indian land in California, by this means.

We are prepared to prove that to the taking of their land the Pitt River Indians did not give consent. We are prepared to prove that there was no payment made to the Pitt River Tribe of any of them. We are prepared to prove that the Pitt River Tribe was not given any land to replace the land that was taken. We are prepared to prove that nowhere else, and from no other source, could the Indians obtain land to replace the land that was taken. We are prepared to prove that White men could at that time obtain ample land out of the public domain. We are prepared to prove that the taking of Pitt River Land denied to the Pitt Riber Tribe the equal protection of the law which is built into the Fifth Amendment.

LEGAL AUTHORITIES

We have already referred to Woody, in

which the California Supreme Court, upon the basis of a factual record, declares that the application of the Statute to Indians would be unconstitutional. The Supreme Court uses this language:

> "The record thus establishes that the application of the statutory prohibition of the use of Peyote results in a virtual inhibition of the practice of defendants' religion." (61 C.2d at 722)

You will notice that the record was made in the trial court, not in the California Supreme Court.

Woody also rejects the prosecution position that the state had a compelling reason for prohibiting Peyotism in the case of Indians. The Supreme Court rejects this upon the basis of the evidence at the trial (page 722).

Woody stands for a number of propositions. One, that a statute which in its operation inhibits the practice of religion is unconstitutional, as applied. Two, the proper way to establish this unconstitutionality is the presentation of facts in the trial court. Three, the State's compelling reason" for applying the statute to the particular group, in this case Indians, can be answered by a factual presentation. Four, this factual presentation should be made in the trial court.

A relevant case is People v. Gordon, 105 Cal,App.2d 711. In its opinion, the Court states (at 718):

> "State laws will not be invalidated without the support of relevant factual material which will "afford a sure basis" for an informed judgment."

It would follow from this that the party

claiming the unconstitutionality must be permitted, in the trial court, to make his factual showing. The clear implication of Gordon was expressed in precise wording in a precise holding in D'Amico v. Board, 6 CA. 3d 716. That decision reversed the court below because it did not hold a full-scale hearing on the facts upon which the unconstitutionality was premised. In that case, the court below decided the matter on demurrer. The court reversed, making crystal clear that it was handled wrong below.

The court says:

> "Insofar as the question of the constitutionality of the 1962 Osteopathic Act is concerned, the question of whether there are facts which would justify a different classification of graduates from medical schools from these osteopathic schools is one which, under the

pleadings in this case, should be decided in the first instance by the superior court, and that court not having determined that question, the case will have to be remanded for that determination. This question should not be determined on demurrer but by a trial."

It is to be noted that, as far as can be determined, the party claiming unconstitutionality did not even attempt to obtain an evidentiary hearing in the court below. Nevertheless, the court sent it back for such a hearing.

It is now so routine for lower courts to conduct evidentiary hearings on unconstitutionality that the Supreme Court of the United States rarely comments on the need for such a hearing.

We will refer to a few Supreme Court decisions to indicate how clearly this

right to an evidentiary hearing is established and protected.

One of the leading cases is Borden's v. Baldwin, 293, U.S. 194. In this case, as in ours, there was a claim of unconstitutionality. The court dismissed the cause for failure to state a cause of action. The Supreme Court reversed in order that the court below could provide a factual hearing to determine what was needed to be determined factually in order to determine the constitutional question.

The opinion says.

> "But where the Legislative action is suitable challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With a notable expansion of the scope of

governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support." (Page 210)

....

"While the complaint is lacking in the specific and definite allegations as to trade conditions which would be appropriate to the plaintiffs' assertions in supporting its attack on the statute, we think that the plaintiffs should not be refused standing in court upon the allegations made.

As we do not approve of the proecdure adopted below we do not pass upon the ultimate question of the constitutionality of the statute... The facts should be found and conclusions of law stated as required by Equity Rule 70-1/2." (Page 213)

As usual, Justices Stone and Cardozo are particularly pellucid. In their Concurring Opinion, they say:

"We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to the complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answers to the questions clearer." (Page 213)

Another relevant decision of the United States Supreme Court is Hammond v. Schappi,

BLEED THROUGH

275, U.S. 164 where a city ordinance was claimed to violate the Fourteenth Amendment. The court says:

> "Before any of the questions suggested, which are both novel and of far-reaching importance, are passed upon by this Court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence."
> (Page 171)

Another Supreme Court decision is The Chasteleton Corporation v. Sinclair, 264 U.S. 543. There a violation of the Fifth Amendment was claimed in the deprivation of property. The court said:

> "These cases show that the court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law, and if the question were only whether the statute is

enforced today, upon facts that we judicially know, we should be compelled to say that the law has ceased to operate. Here, however, it is material to know the condition of Washington at different dates in the past. Obviously the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the District than here. The evidence should be preserved so that if necessary it can be considered by this court." (Page 548)

Therefore, the Supreme Court reversed the dismissal of the action.

In Railroad v. Alton, 295, U.S. 330, the Supreme Court notes that the court below did what it should do. It took evidence and found upon the basis of the evidence that the Railroad Retirement Act was unconstitutional in violation of the Fifth

Amendment. Relying upon this evidence, the Supreme Court affirmed.

In Whitney v. California, 274 U.S. 357, the Supreme Court was dealing with a First Amendment constitutional attack. In their Concurring Opinion, Justices Brandeis and Holmes declared:

> "Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue of whether there actually did exist at the time a clear danger."
> (Page 379)

Since we are making a factual claim, of which the Appellate Courts could not take judicial notice, any decision, for us or against us, is certain to be sent back to the Superior Court for an evidentiary hearing. This would be an extraordinary and unnecessary, and if we may be permitted the

word, a ridiculous waste of time. In the process of appeals, we might have gone through as many as five appeals until all parties are satisfied and the Supreme Court of the United States has expressed itself; for it is not impossible to go through the State Court of Appeals, the State Supreme Court, the Federal District Court, the Federal Court of Appeals and then to the United States Supreme Court.

We submit that defendants will not be able to find a single case, at least in the last fifty years, where the Supreme Court of the United States has denied to a party contesting constitutionality, the right to make a factual showing. While there may be some cases where the United States Supreme Court is prepared to permit the factual showing in the first instance in the U.S. Supreme Court, this is not very likely to occur. Therefore we say that an

evidentiary hearing should be provided in this court and a decision on our constitutional contentions on demurrer would be invalid - as a matter of fact it would be unconstitutional.

Dated: April 21, 1973.

Respectfully submitted,

s/ Aubrey Grossman

AUBREY GROSSMAN
Attorney for Plaintiffs

APPENDIX C

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Shasta)

PITT RIVER TRIBE OF INDIANS, Plaintiff and Appellant, v. PACIFIC GAS AND ELECTRIC COMPANY, Defendant and Respondent.	3 Civil 14408 (Superior Ct. No. 43237)
PITT RIVER TRIBE OF INDIANS, Plaintiff and Appellant, v. THE HEARST CORPORATION, Defendant and Respondent.	(Superior Ct. No. 43298
PITT RIVER TRIBE OF INDIANS, Plaintiff and Appellant, v.	(Superior Ct. No. 43317

KIMBERLY-CLARK CORPORATION,

Defendant and Respondent.

PITT RIVER TRIBE OF INDIANS,

Plaintiff and Appellant,

v.

PUBLISHERS FOREST PRODUCTS,

Defendant and Respondent.

(Superior Ct. No. 43318)

PITT RIVER TRIBE OF INDIANS,

Plaintiff and Appellant,

v.

DIAMOND INTERNATIONAL COMPANY,

Defendant and Respondent.

(Superior Ct. No. 43319)

PITT RIVER TRIBE OF INDIANS,

Plaintiff and Appellant,

v.

FRUIT GROWERS SUPPLY COMPANY,

Defendant and Respondent.

(Superior Ct. No. 43321

PITT RIVER TRIBE OF INDIANS,

Plaintiff and Appellant,

(Superior Ct. No. 43577)

v.

U. S. PLYWOOD CORPORATION,

Defendant and Respondent.

PITT RIVER TRIBE OF INDIANS,

Plaintiff and Appellant,

v.

SOUTHERN PACIFIC LAND COMPANY,

Defendant and Respondent.

(Superior Ct. No. 44640)

Plaintiff, Pitt River Tribe of Indians, (hereinafter "Tribe"), appeals following judgments of dismissal in eight individual cases after Tribe declined to amend second amended complaints for recovery of real property, quiet title, trespass and damages to which defendants' demurrers had been sustained with leave to amend.[1]

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[1] Each complaint names only one defendant. The eight complaints and the issues presented by each case are identical. The cases are consolidated on appeal as they were in the trial court. The several defendants are: Pacific Gas and Electric Co., The Hearst Corporation, Kimberly-Clark Corporation, Publishers Forest Products, Diamond International Company, Fruit Growers Supply Company, U.S. Plywood Corporation, Southern Pacific Land Company.

Tribe's second amended complaints contain fourteen causes of action. The first eight causes of action are grounded on the allegation of ancient ownership by Tribe of the subject property. Three of the first eight causes of action also allege that if Tribe was subsequently divested of title by operation of certain federal statutes, such divestiture was (a) in violation of its right under the United States Constitution, Amendments V and IX, and the Treaty of Guadalupe Hidalgo; (b) the result of "genocidal acts of Federal and State Governments and by white settlers;" (c) the result of fraud practiced against Tribe by its guardian, the federal government. Of the remaining causes of action, none allege Tribe's ancient ownership of the subject property. Three of them, asserting no right of ownership at all, allege invalidity of the patents from the federal government to defendant's predecessors in title

and that the land thus remains in the public domain with a consequent right of occupancy and use inhering in the Tribe. Two of the remaining causes of action are based on allegations of title acquired after 1853 respectively by adverse possession and under the doctrine of Cramer v. United States (1922) 261 U.S. 219. The fourteenth cause of action alleges that if the Tribe lost title, it retained the right to gather food, fish, hunt and cut trees on the subject property.[2]

The trial court sustained both special

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[2] The fourteenth cause of action is patently inadequate to state a cause of action, being wholly without essential direct averments of the bases upon which the Tribe asserts the right to use the land. To demonstrate its inadequacy, the fourteenth cause of action is herewith set out in its entirety: "Plaintiff denies that it lost title to Pitt River land by operation of the Statutes of March 3, 1951 and March 3, 1853, but if it was [sic] so lost plaintiff retained the right to fish, hunt, gather food and cut trees on said land. Defendant has prevented, and still does prevent plaintiff from exercising said rights."

and general demurrers to each of the several causes of action in the second amended complaints on grounds, inter alia, that the facts stated were insufficient to constitute cause of action.

If, as defendants contend, ownership of the land by Tribe "from time immemorial" was extinguished by operation of an act of Congress (An Act to ascertain and settle the private Land Claims in the State of California, March 3, 1851, ch.41, 9 Stat. 631), the trial court correctly sustained the demurrers to the first eight causes of action which were grounded on a claim of ancient ownership antedating the operative date of the cited statute. After examining authoritative decisions of the federal courts construing the effect of the Act of March 3, 1851 (see United States v. Reynolds (1914) 235 U.S. 133, 148; 6 Witkin, Cal Procedure (2d ed. 1971) Appeal, §673, pp. 4586-4587), we are constrained to agree with the position taken by defend-

damts. Any interest of Tribe in the subject lands dependent upon ownership or possession "from time immemorial" was extinguished by failure of Tribe to comply with the cited enactment.[3] (Barker v. Harvey (1901) 181 U.S. 481, 491-492; United States v. Title Ins. Co. (1924) 265 U.S. 472, 484-487; Super v. Work (1925) 3 F.2d 90, 91, fff'd. 271 U.S. 643; see also Thompson v. Doaksum (1886) 68 Cal. 593.) Furthermore, the power of

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[3] The Act of March 3, 1851, followed ratification of the Treaty of Guadalupe Hidalgo (9 Stat. 922) and set up a procedure for hearing and determining claims to California land arising "... by virture of any right or title derived from the Spanish or Mexican government,..." (Ch. 41, 9 Stat. 632.) The Act further provided that all lands, the claims to which have been rejected as provided therein, and "...all lands the claims to which shall not have been presented [as provided therein] within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States." (ch. 41, 9 Stat. 633.) It appears from the fact of the complaints herein that Tribe did not present a claim to the subject lands as provided by the Act.

Congress over extinguishment of Indian title based on aboriginal possession is supreme. "The manner, method and time of such extinguishment raise political, not justiciable, issues."[4] (U.S. v. Santa Fe Pacific R. Co., (1941) 314 U.S. 339, 347; Tee-Hit-Ton Indians v. United States (1955) 348 U.S. 272,281, 284-285.)

We consider now the three causes of action which attack the validity of the patents issued to defendants predecessors in interest. A patent "is a title from its date, and has always been held conclusive against all those whose right did not commenct previous to its emanation..... If the patent has been issued irregularly, the Government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still

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[4] For this reason the trial court did not err in denying Tribe's motion for an evidentiary hearing to demonstrate the constitutional informity of the Act of March 3, 1851, and the manner of its implementation.

vacant, and to appropriate it to himself.'" (Burke v. Southern Pacific R.R. Co. (1914) 234 U.S. 669, 692-693.) To attack the title of a patentee and compel transfer thereof, the claimant must show that he himself was entitled to the patent from the government and that, because of erroneous rulings of the responsible government officials, it was refused to him. It is not sufficient to show that there may have been error in awarding title to the patentee. It must appear that by law the title should have been conferred upon the claimant. (Bohall v. Dilla (1885) 114 U.S. 47, 50-51.) Moreover, in the absence of an act of Congress, only the federal attorney general or his authorized designee may sue to set aside a patent issued by the United States. (United States v. Throckmorton (1878) 98 U.S. 61; Northern Pac. Ry. Co. v.

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McComas (1919) 250 U.S. 387, 393.)

Survey and sale of lands in the public domain in California, including all lands here involved to which title was not confirmed under the Act of March 3, 1851, was provided for by Congress in the Act of March 3, 1853 (An Act to provide for the Survey of the Public Lands in California, etc. (ch. 145, 10 Stat. 244)). In these three causes of action, Tribe does not allege title to or ownership of the land prior to the issuance under the 1851 or 1853 Acts of patents to defendants' predecessors in interest or any other basis upon which it was itself entitled to award ofthe patents. Thus Tribe has no standing to contest the validity of the patents under which defendants deraign title.

The tenth cause of action purports to be predicated upon the doctrine of Cramer v. United States, supra, 261 U.S.

219. In that case it was shown that for approximately seven years after 1853 Indians had lived upon 150 to 175 acres of land in the public domain in California which they had fenced, irrigated, cultivated and upon which they had erected houses and outbuildings. Their claim to a possessory interest therein was upheld as against that of the government's grantee of a larger parcel which included the Indian land but from which were excepted lands which had been "granted, sold,reserved, occupied by homestead settlers, or otherwise disposed of." (Cramer, supra, p. 225.) In holding that the land occupied by the Indians was land which had been "otherwise disposed of" withinin the meaning of the grant, the Supreme Court characterized the Indians' possession as "definite and substantial in character

and open to observation" at the time the subsequent grant was made. (Cramer, supra, at p. 230.)[5]

The operative portion of the tenth cause of action in its entirely alleges: "After March 3, 1853, while Pitt River land was part of the public domain, plaintiff occupied it and acquired title under the principle enunciated in Cramer v. United States, 261 U.S. 219." The foregoing allegations, constituting no more than a conclusion of law, are demonstrably insufficient to tender an issue under the Cramer rule. Inasmuch as Tribe elected not to amend, we assume that it

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[5]The court held that the Indians were not barred by the Act of March 3, 1851, for failure to present a claim because their claim did not arise from the Spanish or Mexican governments and they were not occupying the lands in question when the Act was passed.

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The judgments are affirmed.

PUGLIA ,P.J.

We concur:

REGAN ,J

JANES ,J.

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APPENDIX D

Order Due
December 12, 1975

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

3rd District, Division --, Civil No. 14408

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PITT RIVER TRIBE OF INDIANS

v.

PACIFIC GAS AND ELECTRIC COMPANY
(AND CONSOLIDATED CASES)

Tobriner, J., and Sullivan, J., did not participate.

Appellant's petition

for hearing DENIED.

SUPREME COURT
FILED
DEC 12 1975
C. E. RISHEL, Clerk
Deputy

I, C. E. RISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this

_____ day of _____, A.D. 19__

Clerk

By _____
Deputy Clerk

Acting Chief Justice

POOR COPY

APPENDIX D

ORDER DUE
December 12, 1975

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
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IN THE SUPREME COURT OF THE STATE OF CALI_
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v.

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Tobriner, J., and Sullivan, J., did not participate

Appellant's petition for hearing DENIED.

SUPREME COURT
FILED
DEC.11, 1975
G. E. BISHEL, CLERK
s/.....
Deputy

I, G.E. Bishel, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my

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office.

Witness my hand and the seal of this Court this 8th day of March A.D. 1976.

By s/.....
Deputy Clerk

s/ Mosk
Acting Chief Justice

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APPENDIX E

Chap. XLI. - An Act to ascertain and settle the private Land Claims in the State of California. (March 3, 1851)

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICAN IN CONGRESS ASSEMBLED, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

Sec. 2. AND BE IT FURTHER ENACTED, That such clerks, not to exceed five in

number, as may be necessary, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

Section 3. AND BE IT FURTHER ENACTED, That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

Section 4. AND BE IT FURTHER ENACTED, That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment

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of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of

the time and place of taking any deposition on the part of the United States.

Sec. 5. AND BE IT FURTHER ENACTED, That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

Sec. 6. AND BE IT FURTHER ENACTED, That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending before the commissioners, that all such testimony

shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

Sec. 7. AND BE IT FURTHER ENACTED, That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpoena commanding the attendance of a witness or witnesses before the said board or any commissioner.

Sec. 8. AND BE IT FURTHER ENACTED, That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and

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it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

Sec. 9. AND BE IT FURTHER ENACTED, That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision

of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the gounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant,

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shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be presented by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the gounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

Sec. 10. AND BE IT FURTHER ENACTED, That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

Sec. 11. AND BE IT FURTHER ENACTED, That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim

brought before them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, sofar as they are applicable.

Sec. 12. AND BE IT FURTHER ENACTED, That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

Sec. 13. AND BE IT FURTHER ENACTED, That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims

which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisianan, by the sixth section of the act 'to create the office of surveyor of the public lands for the State of Louisiana,' approved third March, one thousand eight hundred and thirty-one: PROVIDED, ALWAYS, That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served

upon the adverse party thirty days before the time appointed for hearing the same. AND PROVIDED FURTHER, That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have b een finally decided, a copy of which order shall be transmitted to the commissioner of the general land office and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the same injunction shall be dissolved.

Sec. 14. AND BE IT FURTHER ENACTED, That the provisions of this act shall not

extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in

existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.

Sec. 15. AND BE IT FURTHER ENACTED, That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

Sec. 16. AND BE IT FURTHER ENACTED, That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the missions are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and

also those which are occupied and cultivated by Pueblos or Rancheros Indians.

Sec. 17. AND BE IT FURTHER ENACTED, That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

Sec. 18. AND BE IT FURTHER ENACTED, That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and issuing writs of subpoena. For furnishing certified copies of any paper or

record, he shall receive twenty cents for every hundred word-, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

APPROVED, March 3, 1851.

APPENDIX F

Chap. CXLV. - An Act to provide for the Survey of the Public Lands in California, the granting of Preemption Rights therein, and for other purposes. (March 3, 1853)

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Surveyor-General for the District or State of California, who is now or may hereafter be appointed by the President, by and with the advice and consent of the Senate, shall keep his office at such place as the President, in view of the public convenience, shall from time to time direct; and the Surveyor-General, if he has not already done so, and his successors in office, before entering upon duty, shall take and subscribe an oath or affirmation, before a judge of a United States Court, or other competent officer, to support

the Constitution of the United States, and faithfully discharge the duties of his office, and give bond in the same amount as other Surveyors-General, the penalty thereof to be increased whenever the Secretary of the Interior shall deem proper. He shall be entitled to receive a salary at the rate of four thousand five hundred dollars per annum, payable quarter-yearly, to commence from the date of entering into bond.

Sec. 2. AND BE IT FURTHER ENACTED, That there shall be allowed for clerk hire in the office of the Surveyor-General the sum of eleven thousand dollars per annum, or so much thereof as may be necessary: PROVIDED, That the salary of no clerk shall exceed the sum of twenty-five hundred dollars per annum; and for office rent, fuel, and other incidental expenses of his office, such sums as

shall be found necessary by the Secretary of the Interior, not exceeding the sum of ten thousand dollars. And the Secretary of the Interior is hereby authorized to cause an official seal to be prepared for the office of the said Surveyor-General; and any copy of or extracts from the plats, field notes, and other records and documents on file in his office, when attested as such, by the said seal, and the signature of the Surveyor-General, shall, in all judicial matters, have the same force and effect as the originals.

Sec. 3. AND BE IT FURTHER ENACTED, That the said Surveyor-General shall have the same power and authority, and perform the same duties respecting the public lands and private claims in the State of California, as by law appertain to and are required of the Surveyor-General in Louisiana, except so far as the same may

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be modified by this act. He shall engage a sufficient number of skilful surveyors as his deputies, whom he shall cause to survey, mea sure, and mark base and meridian lines through such points, and perpetuated by such monuments, and such other correction parallels and meridians as may be prescribed, and also to survey and establish the other lines of the public lands. He shall also cause all private claims to be surveyed after they have been confirmed, so far as may be necessary to complete the surveys of the public lands; and in the location and survey of them he shall have the same power and authority as are conferred on the land officers of Louisiana by creating the office of the Surveyor-General for that State; and for surveying the base and meridian lines, and private claims, and meandering navigable waters,

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the deputy surveyor shall be allowed not exceeding sixteen dollars per mile; and for surveying the other lines of the public lands there shall be paid not exceeding an average of twelve dollars per mile: Provided, That none other than township lines shall be surveyed when the lands are mineral or are deemed unfit for cultivation; and no allowance shall be made for such lines as are not actually run and marked in the field, and were actually necessary to be run.

Sec. 4. AND BE IT FURTHER ENACTED, That if, in the opinion of the Secretary of the Interior it shall be advisable, he is hereby authorized to direct such surveys after what is known as the geodetic method. And whenever, in the opinion of the Secretary of the Interior, a departure from the rectangular mode of surveying and subdividing the public lands would

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promote the publicinterests, he may direct such change to be made in the mode of surveying and designating the said lands as he may deem proper,with reference tothe existence of mountains, mineral deposits, and the advantages derived from timber and water privileges: Provided, That such lands shall not be surveyed into less than one hundred and sixty acres, or subdivided into less than forty acres.

Sec. 5. AND BE IT FURTHER ENACTED, That there shall be appointed by the President, by and with the advice and consent of the Senate, a register of the land office and receiver of public moneys for the State of California, at such time as, in his judgment, the public interest may demand, with a salary each of three thousand dollars per annum, payable quarter-yearly; and the land office

and the land office shall be located at such place as the President, in view of the public convenience, shall from time to time direct; and, previously to entering on the duties of their offices, they each shall take and subscribe an oath or affirmation, before one of the Judges of the United States Courts, or other competent officer, to support the Constitution of the United States, and faithfully to discharge the duties of their respective offices,and shall give bond in the same amount as other registers and receivers of the public land offices; and their general duties and responsibilities shall be the same as other officers of like character: PROVIDED, HOWEVER, That at such time or times as in his judgment the public interest may so imperatively require, and in the absence of any further and

special legislation of the Congress on the subject, it shall be lawful for the President of the United States to divide the State of California into two or three separate and distinct land districts, as circumstances shall determine to be necessary, embracing respectively the upper and lower, or the upper, middle, and lower portions of the State; and he shall appoint, by and with the advice and consent of the Senate, or during the recess of Congress when necessary, a register of the land office and receiver of public moneys for each of such land distr icts; and the land offices for the same respectively shall be located at, and be removed from time to time to such places as the President shall deem most suitable for public convenience.

Sec. 6. AND BE IT FURTHER ENACTED,

That all the public lands in the State of California, whether surveyed or unsurveyed, with the excpetion of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the preemption laws of fourth September, eighteen hundred and forty-one, with the exceptions, conditions, and limitations therein, except as in herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State of the time and place of of sale, under

under the laws, rules, and regulations now governing such sales, or such as may be hereafter prescribed: PROVIDED, That where unsurveyed lands are claimed by preemption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices, and proof and payment shall be made prior to the day appointed by the President's proclamation for the commencement of the sale, including such lands; the entry of such claims to be made by legal subdivisions, according to the United States' survey, and in the most compact form: AND PROVIDED FURTHER, That the fact of persons having heretofore had the benefit of said act of the fourth of September, eighteen hundred and forty-one, shall interpose no bar to their obtaining the benefits of this act; and

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all of said lands that shall remaind unsold after having been proclaimed and offered, shall be subject to entry at private sale as other public land, at the same minimum price per acre; and the register and receiver shall not be entitled to any per centage or fees, except for deciding preemption cases, when each of them shall be allowed the same fees as are paid to other like officers; but the receiver shall be entitled to his actual necessary expenses, going and returning, in making his deposits: PROVIDED, That nothing in this act shall be construed to authorize any settlement to be made on any public lands not surveyed, unless the same be made within one year from the passage of this act; nor shall any right of such settlers be recognized by virtue of any settlement or improvement made

of such unsurveyed lands subsequent to that day: AND PROVIDED FURTHER, That this act shall not be construed to authorize any settlement to be made on any tract of land in the occupation or possession of any Indian tribe, or to grant any preemption right to the same.

Sec. 7. AND BE IT FURTHER ENACTED, That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the Act of Congress approved on the twentieth day of May, eighteen hundred and twenty-six,

entitled, "An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for," and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands.

Sec. 8. AND BE IT FURTHER ENACTED, That the public lands, not being mineral lands, occupied as towns or villages, shall not be subdivided,or subject to sale,or to be appropriated by settlers, under the provisions of this act; but the whole of such lands, whether settled upon before or after the survey of the same, shall be

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subject to the provisions of the act entitled "An act for the relief of the citizens of towns upon the lands of the United States, under certain circumstances," approved May twenty-third, eighteen hundred and forty-four, except such towns as are located on or near mineral lands, the inhabitants of which shall have the right of occupation and cultivation only until such time as Congress shall dispose of the same; nor shall any lands specially reserved for public uses be appropriated under the provisions of this act.

Sec. 9. AND BE IT FURTHER ENACTED, That whenever the public surveys, or any portion of them authorized by this act, or by the act approved September twenty-seventh, eighteen hundred and fifty, entitled "An act to create the office of Surveyor-General of the Public Lands

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in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," are so required to be made, as to render it expedient to make cqmpensation for the surveying thereof by the day,instead of by the mile, it shall be lawful for the Comissioner of the General Land Office, under the direction of the Secretary of the Interior, to make such fair and reasonable allowance as, in his judgment, shall be necessary to insure the accurate and faithful execution of that work.

Sec. 10. AND BE IT FURTHER ENACTED, That, except where the President of the United States shall see cause otherwise to determine, each officer to be appointed in virtue of this act, and also every other like officer of the United States, may continue in the uninterrupted

discharge of his regular official duties, and is hereby authorized accordingly so to act, after the day of expiration of his official commission, and until a new commission shall be issued to him for the same office, or otherwise, until the day when a successor shall enter upon the duties of such office; and the existing official bond of any such officer so acting shall be deemed and held to be good and sufficient, and in force until the date of the approval of a new bond to be given by him if recommissioned, or otherwise, for the additional time wherein he may so continue officially to act, pursuant to authority hereof. And the provision as to bonds to be given by Deputy-Surveyors for the faithful execution of their duties, in a penalty of double the estimated amount of money accruing to them under their surveying

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contracts, as required by the act of March third, eighteen hundred and thirty-one, entitled "An act to create the office of Surveyor-General of the public lands for the State of Louisiana," referred to in the thirdsection of this act, shall be and the same is hereby made applicable to the public surveys in the State of California; and the sufficiency of the sureties to all such bonds shall be approved and certified by the proper Surveyor-General; and the same provision is hereby extended to all other branches of the public surveying service elsewhere; and all such bonds heretofore required of Deputy-Surveyors, according to usage in the surveying service, shall be deemed and held to be of the same validity as if the same had been required by law. And it is hereby made the duty of each of the respective Surveyors-General of

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public lands of the United States, so far as is compatible with the desk duties of his office, occasionally to inspect the surveying operations while in progress in the field, sufficiently to satisfy himself, from actual inspection, of the fidelity of the execution of the work according to contract, and the actual and necessary expenses incurred by him while so engaged shall be allowed; and where it is incompatible with his other duties for a Surveyor-General to devote the time necessary to make a personal inspection of the work in progress, then he shall be and hereby is authorized to depute a confidential agent to make such examination; and the actual and necessary expenses of such person shall be allowed and paid for that service, and five dollars per day during the examination in the field: PROVIDED, That such

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examination shall not be protracted beyond thirty days, and in no case longer than is actually necessary; and when a Surveyor-General, or any person employed in his office at a regular salary, shall be engaged in such special service, he or they shall only receive his necessary expenses in addition to his regular salary.

Sec. 11. AND BE IT FURTHER ENACTED, That the Secretary of the Interior be and he is hereby authorized and required to cause to be provided for the office of the Surveyor-General of Oregon, a seal, with such device as shall be deemed suitable, and copies of any papers on file in his office which may be authenticated by him under said seal shall be evidence in all cases in which the originals would be evidence, and from and after the passage of this act the salary

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of said Surveyor shall be three thousand five hundred dollars per annum.

Sec. 12. AND BE IT FURTHER ENACTED, That the quantity of two entire townships, or seventy-two sections, shall be and the same is hereby granted to the State of California for the use of a seminary of learning, said lands to be selected by the Governor of the State, or any person he may designate for that purpose, in legal subdivisions of not less than a quarter-section of any of the unsold, unoccupied, and unappropriated public lands therein, subject to the approval of the Secretary of the Interior, and to be disposed of as the Legislature shall direct: PROVIDED, HOWEVER, That no mineral lands, or lands reserved for any public purpose whatever, or lands to which any settler may be entitled under the provisions of this act,

shall be subject to such selection.

Sec. 13. AND BE IT FURTHER ENACTED, That there shall be and is hereby granted to the State ofCalifornia the quantity of ten entire sections of land, for the purpose of erecting the public buildings of that State, said lands to be selected by the Governor, or any persons he may designate, in legal subdivisions of not less than a quarter-section of any of the unsold, unoccupied, and unappropriated public lands in that State, and subject to the approval of the Secretary of the Interior: PROVIDED, HOWEVER, That none of said seletions shall be made of mineral lands or lands reserved for any public purpose whatever, or lands to which any settler may be entitled under the provisions of this act.

APPROVED, March 3, 1853.

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APPENDIX G

"ONE OF THE LAST HUMAN HUNTS OF CIVILIZATION, AND THE BASEST AND MOST BRUTAL OF THEM ALL."

H. H. BANCROFT
FOREMOST HISTORIAN
ON EARLY CALIFORNIA

Research and writing ..... Roxanne Bailin

An old Indian chief said,

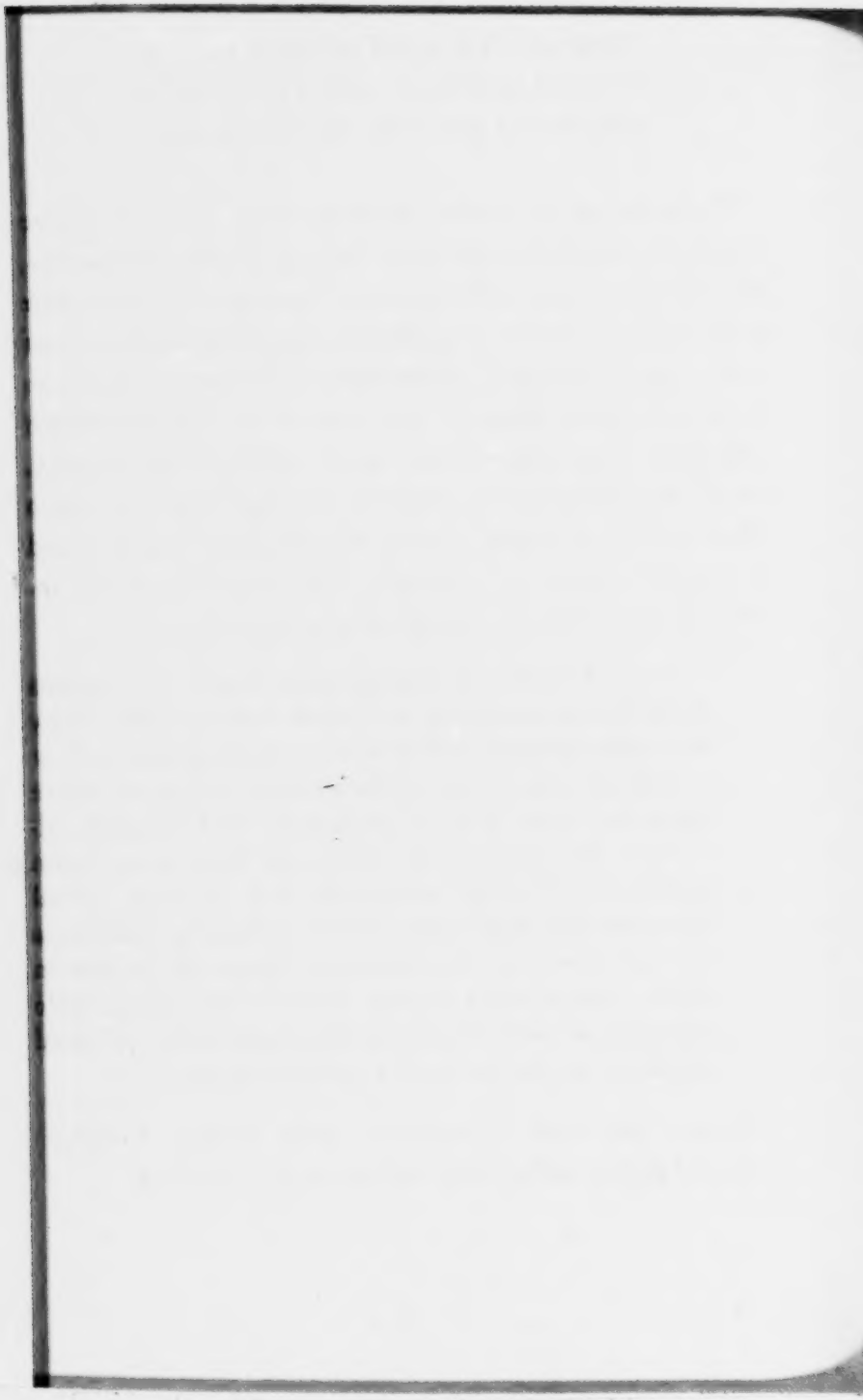
"The valleys, the hills, the rivers, and the trees, belong to my people. They have always lived here; their fathers are buried here; before the white man came they were happy and content. The white man has taken possession of our fields, has fenced our springs, has killed our game and cut down our acorn trees and now they wish to drive us from our homes. We will never go--we will die first."

"ONE OF THE LAST HUMAN HUNTS OF CIVILIZATION, AND THE BASEST AND MOST BRUTAL OF THEM ALL"

The story of the conflict between white men and Native Americans has been told many times in books, newspapers, chronicles, reports and legislative hearings. The particular story of that conflict in California contained in this report is the result of research undertaken to discover how certain lands were taken from the Pitt River Tribe in Northeastern California beginning in the early 1850's. The inquiry, which was designed to support the legal fight to regain tribal lands, uncovered a story of unequalled brutality and of the destruction of a people. The Secretary of the Interior testified before a Congressional committee:

> When American sovereignty was begun, the Indians in California numbered not fewer than 110,000. They were dispossessed with complete ruthlessness, and for several decades their condition was not much more respected than that of predatory wild animals, although the Indians of California had never been predatory. Through starvation and through actual massacre, the population of the Indians in California was cut down to the minimum figure of 20,000 in 1880. The world's annals contain few comparable instances of swift depopulation—practically, of racial massacre—at the hands of a conquering race.[1]

Before the same Committee, John Collier, Commissioner of Indian Affairs and Indian expert, testified:



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> There were 110,000 or more of these Indians in 1852. Everything they had was taken away. They were turned into hunted animals, and their numbers were cut to 20,000 by 1880. It is the most terrible record of destructiveness in Indian annals.[2]

No exact figures are available. Estimates of the number of California Indians in 1850 vary from 100,000 to 250,000. Estimates also vary as to the number still alive in 1900 from 13,000 to 17,000. This means a decimation rate of from eighty-three to ninety-five per cent of the original population.

In 1851, Commissioner Wozencraft, sent by the President to negotiate treaties with the Indians, stated in an open letter to the people of California, "The Indians are treated in a manner that, were it recorded, would blot the darkest page of history that has yet been penned."[3] The charges are serious; the facts are hard to accept. However, the statements recorded here represent a variety of official sources; not isolated biased observers. They are the statements of the Secretary of the Interior, the Commissioner of Indian Affairs, agents of the President of the United States, the General in Command of the Pacific Region, the State Legislative Committees. Beyond the basic proof provided by these statements, we have expanded the story with examples from other documented sources.

There is no need for inflammatory language or selective emphasis of the facts; the facts tell their own simple but dramatic story. Rather, the problem is choosing from innumerable examples of inhumanity: massacre, disease,

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starvation, slavery, and rape. It is an unbelievable story which explains how the Indians of California lost their lands and in most cases their lives.

Before the coming of the white man, the Indians of Northern California had achieved a precise quantitative adjustment to their environment; that is, they took from nature just enough to live comfortably without diminishing its seasonal capacity to produce. The diet of these Indians was copious and varied including roots, berries, and small game. Acorns and salmon provided the staples of their diet. The Indians of the Northern Rivers were proud, physically strong, healthy and vigorous. The freedom and simplicity of their former life in a beautiful and productive land accentuates the tragedy of their gradual reduction to a few starving and landless people.

The process of this reduction was well summarized by Congressman Clarence F. Lea speaking for the Committee on Indian Affairs:

> Mr. Hill. What was the treatment of the Indians at that time? Mr. Lea. It was brutal. There is even a record of advertisements carried in a newspaper for men to go out hunting Indians and bring in scalps or something else to show that they had killed Indians. The white man confiscated their food supplies, if there were any, took their residences, debauched their women, and gave them venereal diseases; it was one of the worst conditions; they brought in smallpox and the Indians died by the thousands. In a few decades the Indian population, which was probably

200,000, at one time, dwindled to less than 20,000, as near as I am able to state.[4]

Men hunted Indians for the profit their scalps would bring as well as from the conviction that Indians impeded the swift takeover of land and gold. The documentation of massacre by both military expeditions and vigilante groups is scattered and incomplete. It is difficult to estimate the numbers who perished in this manner. According to Sherbourne Cook, authority on the treatment of Indians in this period, perhaps 4,000 died from massacre between 1847 and 1852 alone.[5] The *modus operandi* of these affairs was similar in most cases. Indians were accused of running off stock or of killing a white man. A group of settlers would set out in search of an Indian camp. The camp would be surrounded and rushed, usually at dawn, and men in ambush would shoot every Indian that appeared. Dr. C. Hart Merriam, leading authority on the treatment of California Indians, testified in a House of Representatives Hearing:

> In many cases, in fact in nearly all cases, the raiders went entirely beyond the limits of the tribe that could possibly have committed the alleged thefts of stock into the territory of Indians speaking wholly different languages and who would not have sheltered the people who were assumed to have taken the animals. These distant people were butchered and in many cases had never seen a white man before. For instance, a party of volunteer troops under a Government official, Capt. N. Lyon, went from San Francisco north to Clear Lake and Upper Lake and butch-

ered a band of Indians on an island in the lake. Those escaping into the tules were bayonetted. Then the troops marched through Cold Creek Canyon to Russian River and followed down Russian River six miles, where they struck another band of Indians.[6]

Particular reports of massacre filled the local newspapers of the time. The *Petaluma Journal* of April 15, 1857, reported that within the past three weeks three or four hundred "bucks, squaws, and children" had been killed by whites for running off stock. Most of the women were removed to Round Valley but the "bucks are safely disposed of."[7] The *Redding Courier* in the September 17, 1859, edition refers with no detail or any of the circumstances to two whites being killed in Pitt River Valley, but follows with great detail the forming of a company of 19 whites, hunting down Pitt River Indians and killing 22 warriors, and 40 "squaws" and children. It adds that "the citizens of Pitt River Valley are determined to keep the company in the field until the Indians are wiped out."[8]

Two hundred also were massacred at Eureka in April, 1860, by thugs and settlers. They attacked at night and cut the throats of all men, women, and children. One man who had sat on the previous grand jury at Eureka boasted of killing 60 infants with his hatchet at the different "slaughter grounds."[9] During the winter of 1858-59, 150 were massacred at the Nome Cult Valley reserve.

There were, at various times, reservations or reserves set aside by Presidential Executive Order or by statute in California. Even on these reserves, Indians were not safe from

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massacre, as the Nome Cult Valley example shows. Upon investigation, the military found that after a few cattle had been lost

> Armed parties went into rancherias in open day . . . and shot the Indians down--weak, harmless and defenseless as they were -without distinction of age or sex; shot down women with sucking babes at their breasts; killed or crippled the naked children that were running about . . .[10]

Casualties from massacre were relatively low compared to deaths that were due to disease in Northern California from 1848 to 1865.[11] Secretary of the Interior Ickes stated before the 76th Congress that "thousands have died from these imported diseases the sanitary and other conditions are such that death usually followed closely upon the attack of disease."[12] White diseases hit especially hard on a non-immune population, weakened by poor diet and living in terrible, unsanitary conditions. Epidemics occurred of cholera, bronchitis, and scarlatina in 1851; smallpox in 1852, 1861 and 1868, and whooping cough and measles in 1856. Besides these, there were small flare-ups and chronic illnesses--dysentery, tuberculosis, cholera, typhoid, malaria, smallpox, whooping cough, pneumonia, and measles.[13] In 1853, five hundred died in Nevada City of smallpox and typhoid. Eight hundred Maidu died of influenza and tuberculosis in the same year. Of six hundred Maidu collected for shipment to Round Valley Reservation, one hundred died of malaria. Thirty-five hundred Maidu died of disease by 1865.[14]

The greatest killer, which carried with it infertility, insanity, malformation, and infant mortality, was syphilis. Indian people contracted syphilis, in the main, from white men who abducted and raped Indian women. In a very small area a Dr. Ryer reported 440 cases of syphilis in the first half of 1851.[15] The *New York Century*, May, 1860, reported:

> A gentleman who has spent much time in Mendocino County informs us that intercourse of whites with Clear Lake Indians . . . had laid the foundation for the ultimate extermination of the race by disease . . . of 500-600 squaws from 10 years old upwards, he assured not a solitary individual is exempt.[16]

Had the various diseases hit a strong people, perhaps the statistics would have been less devasting. By the early 1850's, many of the Indians of Northern California were so weakened by malnutrition that they were unequal to the force of communicable disease. The statement of Special Agent Kelsey before a Committee of the 66th Congress provides an authoritative summary of the gradual usurpation of food sources:

> The first effect of the occupation of the land by the miners was the muddying of the streams by the mining operations and the killing or frightening away of the game, thus cutting off the Indians' fish and game supply. The mining population soon needed gardens, and about the only land suitable was that where the edible roots grew. The stock industry followed very soon, and even the oak trees were fenced in and

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> forbidden to the Indians, as the acorns were needed for hogs. Later the era of wheat came and arable lands passed into private ownership. The Indians were thus reduced from a state of comparative comfort to one of destitution.[17]

In addition, often the destruction was malicious. Indian Agent Johnson reports on June 24, 1851:

> The Indians returned to the mountains, leaving behind them their principal stores of subsistence, intending to return for them as necessity required. The whites, in pursuing them, burnt and destroyed all that fell in their way . . .[18]

General G. F. Beale reports to the Governor on July 12, 1855:

> The Trinity River is rated as the best in the country for salmon fish, which constitutes almost the whole subsistence of the Indians. The whites took the whole river and crowded the Indians into the sterile mountains, and when they came back for fish they were usually shot.[19]

The *Sacramento Union,* November 10, 1854, spoke of the McCloud and Pitt River Indians and commented, "in winter they have great difficulty in keeping body and soul together."

Agents all over California reported that the Indians were starving:

> The agent has learned that Messrs. Kelsey and Woods

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> have visited two Indian rancherias near this camp, and found many Indians sick and in a starving condition. . . . Two bullocks were killed, one for each rancheria, all of which was consumed by the Indians in a very short time, entrails, feet, and the hide, with a degree of voraciousness only equalled by hungry animals.[20]

In response, Congress occasionally authorized purchase of cattle and flour, but more often it was outraged at the expense. Appropriations for cattle did not mean the delivery of cattle to the Indians. The system of accountability was such that no voucher was understood to mean what it expressed on its face—500 beef did not mean 500 purchased and delivered but 500 bought, and perhaps 100 delivered and 400 resold.[21] Congressional debate for appropriation includes testimony that private contractors were charging three times the going rate for cattle and delivering it in pieces, not on the hoof, if it was delivered at all. The result--hunger and death all over California. Thousands died of starvation. Malnutrition caused the low birth rate, high infant mortality, decrease of milk secretion, and the weakened condition which made Indians more susceptible to disease. As a result, population-increasing factors could not counter-balance depopulation.

While hunger and disease shriveled the bodies of many Indians, others remained strong enough to be oppressed in still another way: through slavery. The practice of slavery grew out of indenture laws and the use of volunteer forces against the Indians. The indenture statute of 1850 allowed

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any person to obtain a minor on the approval of his parents and friends for purposes of work in return for food, shelter, and clothing, even beyond his majority.[22] The system in its ideal state provided a way for some parents to prevent their children from starving. In actuality, indentured children were virtual slaves, cruelly treated by their owners. Another law of 1855 allowed "vagrant" Indians to be auctioned and sold to be worked for four months with no compensation. Indians were brought to court for being drunk so they could be assigned to work without pay for farmers and miners. The operation was jocosely referred to as the "Los Angeles Slave Market."[23]

Laws provided the cover for virtual kidnap and slavery of Indians. Commissioner of Indian Affairs William P. Code reported to the Secretary of the Interior, Smith, in 1861, that indenturing was just another name for enslaving. The Indians "have become victims of the avarice of base and designing men," he wrote.[24] The *Humbolt Times* quoted by the *San Francisco Bulletin* of March 2, 1861, reported that former Indian agent V. E. Geiger had gotten eighty natives apprenticed to him to work the Washoe mines. The *Marysville Appeal* of January 4, 1861, reported that certain men "recently connected with the Nome Lackee Reservation" had persuaded the county judge of Tehama County to indenture to him "all the most valuable Indians on the reservation."[25]

The legal cover-up was quite often not used. Special Agent Kelsey reported:

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> Quite a number of raids were reported . . . their sole object, it seems, having been to secure slaves. Some Indians are reported to have been so held even after the legal extinction of slavery in the United States.[26]

Perhaps the most terrible outrage against the California Indians was the practice of kidnapping children. George Hanson, U.S. Agent, reported to Commissioner of Indian Affairs, Dole, in 1861:

> A band of desperate men have carried on a system of kidnapping for two years past. Indian children were seized and carried into lower counties and sold into virtual slavery. . . . The kidnappers follow at the heels of the soldiers to seize the children when their parents are murdered and sell them at the best advantage.[27]

In October, 1862, George Hanson captured three men with nine captives. The men said they were taking the children as an act of charity because the parents had been killed. When Hanson inquired how they knew the Indian parents had been killed, one man replied, "Because I killed some of them myself."[28]

Kidnapping had become a business. As early as 1854, the *Alta California* of October 2 reported:

> Abducting children has become quite a common practice. Nearly all the children belonging to some of the Indian tribes in the Northern part of the state have been stolen. They are taken to the southern part of the state and there sold.

The editor of the *Sacramento Union* wrote on July 19, 1862:

> There is a class of whites who systematically kill adults to get their children.[29]

Sherbourne Cook estimates, from reports written in California at the time, that from 1852 to 1867, three or four thousand children were stolen.[30] Cook is a careful scholar who admits that his statistics are conservative. He worked from limited sources and fragmented reports. The number of children stolen, as well as the number of women and male laborers kidnapped, is many times greater than it is possible to establish from records.

The number of women abducted and raped is enormous. Whenever a miner or soldier took a fancy to an Indian woman, he did not meet any resistance from the law. Indian men, however, did resist and were often killed in the effort.

Flagrant acts of cruelty, for its own sake, were many. Doctor Merriam stated in his testimony before a Congressional Committee that "On the Klamath and Salmon Rivers, the giant miner's hose nozzles were aimed at Indian villages, dumping houses into the canyons below."[31]

A Mr. Lockhart reported that before leaving Pitt River, "he had mixed a considerable quantity of strychnine with flour, and placed it where it could be found and consumed by the starving Indians."[32]

The Federal Government, that is, the Commissioner of Indian Affairs, U.S. Senators, Congressmen, and the Presi-

dent, received a steady stream of reports and correspondence from Indian Agents, commissioners and private citizens informing them of the conditions in California.

The Indians were prey to white onslaught. Countless times, Indian Agents called for more troops to *protect* Indians who had fled to the mountains before marauding whites.[33] Redick McKee, Indian Agent, requested of Commissioner Lea that "the government send the military commandant of this division the men and means to establish small military posts to protect Indians from such attacks."[34] Some reserves were later set aside for the Indians which were intended to provide sanctuary for, at most, 2,500 Indians. A strong military force could have rid these reserves of white settlers. The Federal government failed to provide adequate troops; as a result, Indians did not have enough land free of white encroachment to grow food. The provisions they managed to produce were many times destroyed by settlers.

In 1860 the four hundred Achomawi (Pitt River) and Maidu who were shipped by the Government to the Round Valley Reservation "left" because they were starving.[35]

George Hanson, Indian agent, reported to the Commissioner in October, 1862, that Concow and Hat Creek (Pitt River) Indians had left because they were starving on the reserve after white settlers had destroyed a large portion of the small grain crops and the corn crop entirely. He found seven slip-gaps where corners of the fence had been raised and chunks of wood put in so that the largest hogs could

walk in. The settlers told the Indians there was nothing for them to eat and if they did not leave, the whites would kill them.[36] In a later letter, Hanson reports that two thousand bushels of wheat produced by the Indians had been burned by white settlers. Sometimes starving Indians came to the reservations for food and protection. They accepted the white man's demand that they give up their traditional ways; they accepted the white man's demand that they till the earth—yet they starved. Reservations became places where Indians died *en masse*. Large numbers and small acreage magnified the dangers of epidemic and food shortage. Faith in United States protection was again misplaced.

During the forced removal of Indians to reserves by official expeditions, hundreds died of disease and starvation. The testimony of Mr. Johnson before the 75th Congress describes a typical removal operation. He refers to a Paiute lady sitting near him and states:

> Her people were driven by soldiers and officers through the passes of the mountains to the east side without food or water, and when a woman could not carry her children, they were torn from her back and thrown under the bushes. They left their little babies behind . . . but the soldiers came along and speared them, shot them and abused them.[37]

Many died on the way, but more died when they reached the reserves. Often the Indians came finding no provisions, houses, or other facilities. The report, dated June, 1856, of

Lieutenant Rundell, on the Klamath River, transmitted through Pacific Headquarters of the Army on the 17th of June, 1856, states that very little as yet has been done for the Indians of Northern California. About four hundred had been removed to the mouth of the Klamath. A new agent, Mr. Patterson, refused to give them more than fifty rations per day.[38]

Money was no answer to the hunger situation in California. Hundreds of millions of dollars appropriated by Congress would have barely maintained the Indians with beef and flour, a diet to which their bodies were not accustomed. The guilt of the Federal Government lay in its failure to provide land so that the Indians could have produced or gathered food for themselves as they had done before the white man came. Agents from the field warned the Government that the Indians would soon have no place to live: "Our people are in fact filling every habitable foot of ground in the entire state to the exclusion of the original occupants."[39] The Government did not respond with troops or with the one thing which could have saved the Indians -land.

Much, much later, the Government began to provide land allotments for the few Indians who had not been killed or driven off their lands. The small number who received allotments found them most often the poorest land available. Harold Ickes, the Secretary of the Interior, reported:

> The Golden State is widely known as a land of fruit and flowers and mild climate. It does not seem to be well understood that a considerable portion of the State of California, larger than most Eastern States,

> has a severe winter climate with heavy snow fall, and that there are also extensive deserts. The allotments referred to are in this portion of the State. Over 300 allotments are absolute desert, being sagebrush plains without water or the hope of water. Six hundred more allotments are located in the Sierra Nevada Mountains, where the land, or rather rocks, incline up at an angle 45 degrees or more, and the snow falls often 30 to 40 feet deep and lies from October to June. It would seem that even a special agent from the Atlantic littoral ought to have known better than to allot either kind of land to anyone for a home, and yet that is just what was. More than three-fourths of the allotments in that section are absolutely unfit for human habitation, and it is not strange that the Indians have been unable to do anything with them.[40]

In the early Fifties, the Government began to give away or sell the usable land in California. Until 1876, the only qualification needed to get this land was not to be an Indian. By then the best land was taken, and most of the Indians were gone.

The Federal Government's judgment of itself was delivered by the acting Secretary of the Interior to a Congressional Committee which was assessing the matter. He said

> It will be for Congress to determine what measure of compensation is due to the survivors of those more than one hundred thousand Indians who were done to death by the actions and laches [inaction] of the guardian government between the years 1848 and 1880.[41]

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If the Federal Government was guilty of ignoring the conditions in California, the State Government was malicious for encouraging the white onslaught. When the three Commissioners from Washington succeeded in negotiating eighteen treaties with California Indians, the Legislature recommended rejecting them. Had they not done so, the United Senate would have ratified them and allowed the Indians about eight million acres of land. Instead, however, the State Legislature and the Governor advocated the removal of all Indians beyond the borders of the state.[42]

The State was also guilty of encouraging "chastising" expeditions against the Indians both by subsidizing these expeditions and by looking the other way when the massacres took place. Governor MacDougal, for one, ordered the sheriff of Mariposa to call out two hundred men to "chastise" the Indians.[43] Volunteer groups grew up, such as the Klamath Rifles, the Salmon Guard, the Union Volunteers, and the Pitt River Rangers. They appeared to be private armies; but, in actuality, were called out, armed, amd paid by the State Government. Volunteers received the handsome salaries of from $10 to $15 per day. One such group, the Pitt River Rangers, was formed in September, 1859. A contemporary describes the Rangers as

> Black hearts and savage natures, worse than the Indians, and mostly drunk. After being formed and paid, they laid around drunk for two weeks, and prodded by the settlers to earn their keep, went and massacred the Indians at Rolf's Ranch.[44]

The Appendix to the Journal of the California Senate in 1856 contains a comprehensive report of the aid given the various independent companies. Klamath County had no less than eight such companies. In that year a total of 1,589 muskets, 1,165 rifles as well as sabers, swords, and pistols were issued to volunteer companies.[45]

Another charge against the State Government is its failure to prosecute those involved in massacres. In a letter to Governor Bigler in 1852, Agent Redick McKee tells him of the brutal outrages perpetrated all over the state.[46] Bigler replied that McKee was placing himself at odds with "respectable gentlemen" who reported to the contrary. On September 9, 1852, Commissioner Wozencraft wrote to Commissioner Lea concerning a letter he had sent to Governor Bigler reporting a massacre. Bigler had not replied. Though federal military investigations and state investigations unearthed the facts of the massacre, starvation, disease, and rape and established the truth of thousands of cases, only a tiny fraction were ever brought to trial. None of the outrages against the Indian were treated actually as a crime; and since an Indian could not sue or testify in the State courts, his chances of obtaining justice were virtually nil.

Our brief report of the "darkest page in history" ends here. In summary we quote John Collier at the time of his statement before the 74th Congress:

> They were actually murdered. They were outlawed and treated as wild animals, shot on sight. . . . They

> were enslaved and worked to death. They were treated as predatory animals. They were driven back to totally barren vastnesses, in the Sierras, and out into the desert, and they died of starvation. Their life was outlawed and their whole existence was condemned and their hearts were broken and they died.[47]

Humanity, it seems, was only granted to those whose skins were white or who were willing to conform to a "superior" form of civilization. Civilization in this case was characterized by vicious competition and genocide justified by the need to destroy the obstacles of "progress." In the meantime, the Indians lived in fear: fear of their lives, fear of the torture of illness and starvation, fear of watching their children and spouses dragged to the slave markets. They fled before the guns of the white men driven by greed for land and gold. In the minority report of the Special Committee to Investigate Treaties of the California Senate, J. J. Warner asked:

> Has the love of gold blotted from our minds all the feelings of compassion or justice?

Clearly, the answer was yes.

Footnotes

1. Hearings, Committee on Indian Affairs, U.S. Senate (on S 1651) (3/8/37) p. 8.
2. Same Hearings, p. 40.
3. Senate Executive Document No. 4 (1853) p. 115.
4. Statement of Clarence F. Lea, Hearings, Committee on Indian Affairs, U.S. House of Representatives on H.R. 491 (3/8/28).
5. Cook, Sherbourne, *The Conflict Between California Indians and White Civilization,* University of California Press, Berkeley 1965, p. 8.
6. Hearings, Committee on Indian Affairs, U.S. House of Representatives, 66th Cong. p. 206-208.
7. Taylor, Alexander, "The Indianology of California," *California Farmer,* San Francisco, 1860, Second Series, No. 89, p. 34.
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9. Taylor, Alexander, (Footnote 7 above) No. 91.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1286

PITT RIVER TRIBE OF INDIANS,
Petitioner,

vs.

PACIFIC GAS AND ELECTRIC COMPANY, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court
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No. 75-1286

Pitt River Tribe of Indians,
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vs.

Pacific Gas and Electric Company, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This case does not present any important question of Federal law. The decision below is in accord with long-established principles of law enunciated by this Court.

Petitioner's major contention is that it, as an Indian tribe, has retained an aboriginal Indian right of occupancy in certain lands in California. The decisions of this Court, however, make it clear that any such right of occupancy of California lands has been extinguished by petitioner's failure to comply with an act of Congress. There is likewise no merit to the two other minor arguments presented in the petition.

STATUTE

The statute involved in this case is the Private Land Claims Act of 1851 (9 Stat. 631). This statute is set forth as Appendix A to this brief.

QUESTIONS PRESENTED

The questions stated in the petition include irrelevant and erroneous statements. The actual questions presented are:

1. Are petitioner's claims relating to an Indian right of occupancy barred by petitioner's failure to comply with the Private Land Claims Act of 1851?

2. Under California law, can a cause of action be stated by a pleading which alleges merely the conclusion of law that a party "occupied [land] and acquired title under the principle enunciated in *Cramer* v. *United States*, 261 U.S. 219"?

3. May an individual with no claim to land challenge a patent issued on that land?

STATEMENT OF THE CASE

Much of petitioner's statement of the "background of this litigation" (Pet., pp. 3-8) is inaccurate, irrelevant and confusing. We therefore present the following statement.

A. The parties.

The complaint herein was purportedly filed on behalf of the Pitt River Tribe of Indians and it made claim to

certain land in four counties in Northern California. Respondent Champion International Corporation, sued herein as U.S. Plywood Corporation, is a private corporation which owns property in the four counties in question. Other private corporations, owning land in the same area, were also made parties by the filing of substantially identical complaints.

B. The complaint.

The second amended complaint against respondent Champion contained fourteen purported causes of action. Most of these causes of action were based upon the claim that the Pitt River Tribe retained a tribal right of permanent occupancy in certain California lands.[1] With the exception of its ninth and tenth purported causes of action, petitioner has abandoned its arguments relating to causes of action not based on an asserted right of occupancy. The ninth cause of action seeks to attack patents on land issued to respondent's predecessors. The tenth cause of action alleges a right in land because petitioner assertedly "occupied it and acquired title under the principle enunciated in *Cramer* v. *United States*, 261 U.S. 219."

C. The decisions below.

The trial court ruled that any right of tribal occupancy had been extinguished by petitioner's failure to comply with the Private Land Claims Act of 1851. The court also ruled that each cause of action was barred by the California statutes of limitations and by laches and that prior

[1]Petitioner now estimates this to be a total of 3½ million acres, of which at least 500,000 acres were directly involved in this action (Pet., p. 8).

proceedings by the Pitt River Tribe before the Indian Claims Commission were res judicata, also preventing recovery. Petitioner evidenced its intention not to further amend its complaints and judgments of dismissal were entered in the trial court.

On appeal, the California Court of Appeal affirmed, holding that any asserted right to tribal occupancy had been extinguished by petitioner's failure to comply with the 1851 Act (Appx., pp. xiii-xiv).[2] The court also held that petitioner's ninth and tenth causes of action were deficient (Appx., pp. xiv-xvi). The California Supreme Court denied petitioner's petition for a hearing by that court.

ARGUMENT

I. AS A MATTER OF LAW, PETITIONER HAS RETAINED NO INDIAN RIGHT OF OCCUPANCY.

A. This Court has held that Indian right of occupancy has been extinguished by failure to comply with the Private Land Claims Act of 1851.

The bulk of the petition is devoted to belabored arguments that petitioner has retained a permanent right of occupancy in all the lands that once were used by its ancestors at any time prior to the acquisition of California from Mexico (Pet., pp. 3-32). Petitioner ignores, or misstates, decisions of this Court which are directly to the contrary. Under each of those decisions, any such right of occupancy in California lands has been extinguished by failure to comply with the Private Land Claims Act of March 3, 1851, 9 Stat. 631 (*Barker* v. *Harvey* (1901) 181 U.S. 481,

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[2]The decision of the California Court of Appeal, which is not published, appears as Appendix B to this brief at p. x.

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491-492; *United States* v. *Title Ins. Co.* (1924) 265 U.S. 472, 484-487; *Super* v. *Work* (1926) 271 U.S. 643, affirming *Super* v. *Work* (D.C. Cir. 1925) 3 F.2d 90, 91).

The holdings of those cases were discussed by Mr. Justice Douglas in a subsequent case in which it was argued that Congress had, by statutes, acted with respect to Indian right of occupancy in Arizona as it had in California (*U.S.* v. *Santa Fe Pacific R. Co.* (1941) 314 U.S. 339). Justice Douglas, writing for a unanimous Court, rejected that argument, declaring that the statutes in question in the Arizona case

> "• • • were quite different from the Act of March 3, 1851, 9 Stat. 631, passed to ascertain and settle certain land claims in California. Under § 13 of that Act 'all lands the claims to which shall not have been presented' to the commissioners, appointed to receive and act upon all petitions for confirmation of land claims, 'within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States.' This Court passed on that Act in *Barker* v. *Harvey*, 181 U.S. 481. The plaintiff there claimed under two Mexican grants. The defendants were Indians who claimed a right of permanent occupancy; but they had not presented their claims to the commissioners within the time specified by § 13. This Court held that as a result of that failure their claims were barred. And see *United States* v. *Title Insurance & Trust Co., supra*, 265 U.S. 472. That is to say, *the Act of 1851 was interpreted as containing machinery for extinguishment of claims, including those based on Indian right of occupancy. Since Congress had provided a method for extinguishment, its appropriateness raised only a political, not a justiciable,*

issue" (U.S. v. *Santa Fe Pacific R. Co.* (1941) 314 U.S. 339, 350-351; emphasis added).

Petitioner has always acknowledged that no claim was submitted on the lands here in question. Hence, those lands became a part of the public domain unfettered by any tribal right of occupancy.

B. Petitioner cannot distinguish the decisions of this Court.

Petitioner cannot, and does not seriously attempt to, distinguish this Court's decisions on the question of the effect of the 1851 Act. Each is decisive of petitioner's claim. In *Barker* v. *Harvey* (1901) 181 U.S. 481, this Court, in words applicable to petitioner's present claim, observed:

> "As between the United States and the Indians, their failure to present their claims to the land commission within the time named made the land within the language of the statute 'part of the public domain of the United States.' * * * So far, therefore, as these Indians are concerned the land is rightfully to be regarded as part of the public domain and subject to sale and disposal by the Government * * *" (181 U.S. 490).

That decision expressly rejected the suggestion, made again in the petition (Pet., pp. 28-29), that the lands passed subject to a right of Indian occupancy (181 U.S. 491-492).

Claims similar to petitioner's were once more presented in *United States* v. *Title Ins. Co.* (1924) 265 U.S. 472. Petitioner implicitly recognizes the similarities between its claims and those presented in that case by relying

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upon, and summarizing at length, the brief of the *losing* party (Pet., pp. 18-22). It was there argued, as petitioner now argues, that *Barker* v. *Harvey* should not be followed. To that argument, this Court replied:

> "The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago and affected many tracts of land in California, particularly in the southern part of the State. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with many injurious results" (*United States* v. *Title Ins. Co.* (1924) 265 U.S. 472, 486).

The matter came before this Court on one more occasion. In *Super* v. *Work* (D.C.Cir. 1925) 3 F.2d 90, it was argued that the Act of 1851 did not operate to extinguish asserted rights of occupancy of roving bands of Indians, such as petitioner's ancestors, who made claims to large portions of the public domain. The Court of Appeals rejected that argument (3 F.2d 91) and this Court affirmed per curiam, citing both *Barker* v. *Harvey* and *United States* v. *Title Ins. Co.* (*Super* v. *Work* (1926) 271 U.S. 643).

The passage of 50 additional years has added incalculable weight to the holdings of this Court. No ground for overturning them has been shown. It would now be an understatement to observe that disturbance of those

cases "would be fraught with many injurious results" (*United States* v. *Title Ins. Co.* (1924) 265 U.S. 472, 486).

C. Petitioner's asserted Constitutional claims are meritless.

This Court has also answered petitioner's "hard questions" (Pet., pp. 25-26) with respect to the Constitutional implications of asserted fraud and violence on the part of the United States and the State of California. Redress in such cases obviously could be had only against the offending governments, not private persons. And, as this Court has held,

> "[t]he power of Congress in that regard [i.e., extinguishment of Indian title] is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. * * * [W]hether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts" (*U.S.* v. *Santa Fe Pacific R. Co.* (1941) 314 U.S. 339, 347).

For the same reasons, there is no basis for petitioner's request for an "evidentiary hearing" regarding alleged violations of Constitutional rights (see Pet., pp. 1, 26, 31). Petitioner's remedy for its alleged wrongs is to seek relief directly from Congress. Congress has, in fact, passed statutes to provide compensation for lands taken by the Government and Indians have been granted awards under those statutes (see *The Pitt River Indians of California* v. *United States of America* (1959) 7 Ind.Cl.Com. 815; *Thompson, et al.* v. *The United States of America* (1964) 13 Ind.Cl.Com. 369). If petitioner, or any of its members,

are dissatisfied with such awards, their recourse is to seek additional relief from Congress.[3]

II. PETITIONER STATED NO CAUSE OF ACTION UNDER THE DECISION IN CRAMER v. UNITED STATES.

Although petitioner was given an opportunity to amend its complaint, it declined to do so. Under California law, petitioner is therefore presumed to have pleaded its strongest possible case (*Sierra Investment Corp.* v. *County of Sacramento* (1967) 252 Cal.App.2d 339, 341, 60 Cal. Rptr. 519, 520). Petitioner's tenth cause of action alleges only that

> "After March 3, 1853, while Pitt River land was part of the public domain, plaintiff occupied it and acquired title under the principle enunciated in *Cramer* v. *United States*, 261 U.S. 219."

The California Court of Appeal held that this allegation was insufficient because it was a mere conclusion of law (Appx., pp. xv-xvi).

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[3]The petition contains several unsupported assertions regarding previous awards to Indians (see Pet., p. 7). The fact is that governmental liability was found on the ground that the Pitt River Tribe's right of occupancy had been extinguished by the Tribe's failure to comply with the 1851 Act (*The Pitt River Indians of California* v. *United States of America* (1959) 7 Ind.Cl.Com. 815, 844-849, 862). A settlement as to the amount of compensation was thereafter agreed upon, and the Pitt River Indians and other California Indians were awarded compensation in the amount of $29,100,000 (*Thompson, et al.* v. *The United States of America* (1964) 13 Ind.Cl.Com. 369). Some individuals sought to upset the settlement but were unsuccessful in their efforts (see *Andrade* v. *United States* (Ct.Cl. 1973) 485 F.2d 669, cert. den. sub nom. *Pitt River Tribe, et al.* v. *The United States* (1974) 419 U.S. 831). That matter is now final.

Petitioner itself now concedes that the allegation amounts to nothing more than pleading "whatever you [this Court] require in *Cramer* we plead" (Pet., p. 33). It seeks to excuse such an approach by asserting that this Court's decision in *Cramer* establishes an "amorphous standard" (Pet., p. 33). The decision in *Cramer* is, to the contrary, quite clear. It did not involve any claim of past tribal occupancy. Rather, it involved the claims of three Indians, who, for sixty years, had occupied, fenced and cultivated a specific portion of land which was later included in a larger grant to the defendant. That grant, however, excepted from its operation land "reserved * * * or otherwise disposed of" (261 U.S. 227-230). This Court held that actual possession of the land—which possession had been open to observation by all, both before and at the time of the grant to the defendant—fell within the exception. Recovery was expressly limited to land actually enclosed and occupied (261 U.S. 234-236). It was emphasized that the Indians had obtained possessory rights because of their action "in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating and improving the soil and establishing fixed homes thereon" (261 U.S. 228).

Contrary to petitioner's assertion, the tenth cause of action did not allege that "specific" land was enclosed and occupied (Pet., p. 32). Petitioner does not, and certainly cannot, contend that it enclosed and occupied the entire 3½ million acres to which, elsewhere in the complaint, it made a claim of right of Indian occupancy. The complaint alleged no more than that unspecified land was "occupied." This was patently insufficient.

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III. PETITIONER HAS NO STANDING TO ATTACK PATENTS ISSUED TO RESPONDENT'S PREDECESSORS.

In its purported ninth cause of action, petitioner sought to challenge patents issued to respondent's predecessors. It is established that, even if there may have been error in the issuance of a patent, a stranger with no interest in the land cannot maintain an action to challenge the patent (*Burke* v. *Southern Pacific R. R. Co.* (1913) 234 U.S. 669, 692-693; *Lee* v. *Johnson* (1885) 116 U.S. 48, 49-50; *Bohall* v. *Dilla* (1884) 114 U.S. 47, 50-51). Petitioner did not allege title to, ownership of, or any other right in the land prior to the issuance of the patents which it sought to challenge. Moreover, in view of the decisions of this Court reviewed in the first part of this brief (pp. 4-8), it could not have done so. Accordingly, it had no standing to challenge the patents.

None of the cases cited by petitioner (Pet., pp. 36-37) is to the contrary. They involve either challenges by individuals with a prior right[4] or by the Government itself.[5]

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[4] *Duluth & Iron Range Railroad Co.* v. *Roy* (1898) 173 U.S. 587, 590-591; *Hedrick* v. *Atchison, Topeka &c. Railroad* (1896) 167 U.S. 673, 681; *Doolan* v. *Carr* (1887) 125 U.S. 618, 632-633; *Wright* v. *Roseberry* (1886) 121 U.S. 488, 520; *Kissell* v. *St. Louis Public Schools* (1855) 59 U.S. 19, 27-28; *Johnson* v. *Towsley* (1871) 13 Wall. (80 U.S.) 72, 84-85; *Bagnell* v. *Broderick* (1839) 13 Pet. (38 U.S.) 436, 450.

[5] *United States* v. *Beebe* (1887) 127 U.S. 338, 342.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Dated at San Francisco, California, on April 2, 1976.

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(Appendices Follow)

Appendix A

An Act to ascertain and settle the private Land Claims in the State of California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

SEC. 2. *And be it further enacted,* That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

SEC. 3. *And be it further enacted,* That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

SEC. 4. *And be it further enacted,* That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency as long as the

public interest may, in the judgment of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

SEC. 5. *And be it further enacted,* That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

SEC. 6. *And be it further enacted,* That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses

in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

SEC. 7. *And be it further enacted*, That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpœna commanding the attendance of a witness or witnesses before the said board or any commissioner.

SEC. 8. *And be it further enacted*, That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

SEC. 9. *And be it further enacted*, That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the

United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before

the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

SEC. 10. *And be it further enacted*, That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

SEC. 11. *And be it further enacted*, That the commissioners herein-provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 12. *And be it further enacted*, That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days

after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

SEC. 13. *And be it further enacted,* That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided, always,* That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a

petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further,* That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

SEC. 14. *And be it further enacted,* That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the

claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.

SEC. 15. *And be it further enacted,* That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

SEC. 16. *And be it further enacted,* That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

SEC. 17. *And be it further enacted,* That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum: that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the

aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

SEC. 18. *And be it further enacted,* That the secretary of the board shall receive no fee except for furnishing certified copies of any paper of record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

APPROVED, MARCH 3, 1851.

Appendix B

In the Court of Appeal
State of California
Third Appellate District
(Shasta)

3 Civil
No. 14408

Pitt River Tribe of Indians, Plaintiff and Appellant, vs. Pacific Gas and Electric Company, Defendant and Respondent.	(Superior Ct. No. 43237)
Pitt River Tribe of Indians, Plaintiff and Appellant, vs. The Hearst Corporation, Defendant and Respondent.	(Superior Ct. No. 43298)
Pitt River Tribe of Indians, Plaintiff and Appellant, vs. Kimberly-Clark Corporation, Defendant and Respondent.	(Superior Ct. No. 43317)
Pitt River Tribe of Indians, Plaintiff and Appellant, vs. Publishers Forest Products, Defendant and Respondent.	(Superior Ct. No. 43318)
Pitt River Tribe of Indians, Plaintiff and Appellant, vs. Diamond International Company, Defendant and Respondent.	(Superior Ct. No. 43319)

BLEED THROUGH

Pitt River Tribe of Indians, Plaintiff and Appellant, vs. Fruit Growers Supply Company, Defendant and Respondent.	(Superior Ct. No. 43321)
Pitt River Tribe of Indians, Plaintiff and Appellant, vs. U. S. Plywood Corporation, Defendant and Respondent.	(Superior Ct. No. 43577)
Pitt River Tribe of Indians, Plaintiff and Appellant, vs. Southern Pacific Land Company, Defendant and Respondent.	(Superior Ct. No. 44640)

Plaintiff, Pitt River Tribe of Indians (hereinafter ("Tribe"), appeals following judgments of dismissal in eight individual cases after Tribe declined to amend second amended complaints for recovery of real property, quiet title, trespass and damages to which defendants' demurrers had been sustained with leave to amend.[1]

Tribe's second amended complaints contain fourteen causes of action. The first eight causes of action are grounded on an allegation of ancient ownership by Tribe of the subject property. Three of the first eight causes

[1]Each complaint names only one defendant. The eight complaints and the issues presented by each case are identical. The cases are consolidated on appeal as they were in the trial court. The several defendants are: Pacific Gas and Electric Co., The Hearst Corporation, Kimberly-Clark Corporation, Publishers Forest Products, Diamond International Company, Fruit Growers Supply Company, U.S. Plywood Corporation, Southern Pacific Land Company.

of action also allege that if Tribe was subsequently divested of title by operation of certain federal statutes, such divestiture was (a) in violation of its rights under the United States Constitution, Amendments V and IX, and the Treaty of Guadalupe Hidalgo; (b) the result of "genocidal acts of Federal and State Governments and by white settlers;" (c) the result of fraud practiced against Tribe by its guardian, the federal government. Of the remaining causes of action, none allege Tribe's ancient ownership of the subject property. Three of them, asserting no right of ownership at all, allege invalidity of the patents from the federal government to defendant's predecessors in title and that the land thus remains in the public domain with a consequent right of occupancy and use inhering in Tribe. Two of the remaining causes of action are based on allegations of title acquired after 1853 respectively by adverse possession and under the doctrine of Cramer v. United States (1922) 261 U.S. 219. The fourteenth cause of action alleges that if Tribe lost title, it retained the right to gather food, fish, hunt and cut trees on the subject property.[2]

The trial court sustained both special and general demurrers to each of the several causes of action in the second amended complaints on grounds, inter alia, that the

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[2]The fourteenth cause of action is patently inadequate to state a cause of action, being wholly without essential direct averments of the bases upon which Tribe asserts the right to use the land. To demonstrate its inadequacy, the fourteenth cause of action is herewith set out in its entirety: "Plaintiff denies that it lost title to Pitt River land by operation of the Statutes of March 3, 1851 and March 3, 1853, but if it was [*sic*] so lost plaintiff retained the right to fish, hunt, gather food and cut trees on said land. Defendant has prevented, and still does prevent plaintiff from exercising said rights."

facts stated were insufficient to constitute a cause of action.

If, as defendants contend, ownership of the land by Tribe "from time immemorial" was extinguished by operation of an act of Congress (An Act to ascertain and settle the private Land Claims in the State of California, March 3, 1851, ch. 41, 9 Stat. 631), the trial court correctly sustained the demurrers to the first eight causes of action which were grounded on a claim of ancient ownership antedating the operative date of the cited statute. After examining authoritative decisions of the federal courts construing the effect of the Act of March 3, 1851 (see United States v. Reynolds (1914) 235 U.S. 133, 148; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 673, pp. 4586-4587), we are constrained to agree with the position taken by defendants. Any interest of Tribe in the subject lands dependent upon ownership or possession "from time immemorial" was extinguished by failure of Tribe to comply with the cited enactment.[3] (Barker v. Harvey (1901) 181 U.S. 481, 491-492; United States v. Title Ins. Co. (1924) 265 U.S. 472, 484-487; Super v. Work (1925) 3 F.2d 90, 91, aff'd 271 U.S. 643; see also Thompson v. Doaksum (1886) 68 Cal. 593.) Furthermore, the power of Congress

[3]The Act of March 3, 1851, followed ratification of the Treaty of Guadalupe Hidalgo (9 Stat. 922) and set up a procedure for hearing and determining claims to California land arising ". . . by virtue of any right or title derived from the Spanish or Mexican government, . . ." (Ch. 41, 9 Stat. 632.) The Act further provided that all lands, the claims to which have been rejected as provided therein, and ". . . all lands the claims to which shall not have been presented [as provided therein] within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States." (Ch. 41, 9 Stat. 633.) It appears from the face of the complaints herein that Tribe did not present a claim to the subject lands as provided by the Act.

over extinguishment of Indian title based on aboriginal possession is supreme. "The manner, method and time of such extinguishment raise political, not justiciable, issues."[4] (U. S. v. Santa Fe Pacific R. Co. (1941) 314 U.S. 339, 347; Tee-Hit-Ton Indians v. United States (1955) 348 U.S. 272, 281, 284-285.)

We consider now the three causes of action which attack the validity of the patents issued to defendants predecessors in interest. A patent " 'is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. . . . If the patent has been issued irregularly, the Government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself.' " (Burke v. Southern Pacific R.R. Co. (1914) 234 U.S. 669, 692-693.) To attack the title of a patentee and compel transfer thereof, the claimant must show that he himself was entitled to the patent from the government and that, because of erroneous rulings of the responsible government officials, it was refused to him. It is not sufficient to show that there may have been error in awarding title to the patentee. It must appear that by law the title should have been conferred upon the claimant. (Bohall v. Dilla (1885) 114 U.S. 47, 50-51.) Moreover, in the absence of an act of Congress, only the federal attorney general or his authorized designee may sue to set aside a patent issued by the United States. (United States v. Throckmorton (1878) 98 U.S.

[4]For this reason the trial court did not err in denying Tribe's motion for an evidentiary hearing to demonstrate the constitutional infirmity of the Act of March 3, 1851, and the manner of its implementation.

61; Northern Pac. Ry. Co. v. McComas (1919) 250 U.S. 387, 393.)

Survey and sale of lands in the public domain in California, including all lands here involved to which title was not confirmed under the Act of March 3, 1851, was provided for by Congress in the Act of March 3, 1853 (An Act to provide for the Survey of the Public Lands in California, etc. (ch. 145, 10 Stat. 244). In these three causes of action, Tribe does not allege title to or ownership of the land prior to the issuance under the 1851 or 1853 Acts of patents to defendants' predecessors in interest or any other basis upon which it was itself entitled to award of the patents. Thus Tribe has no standing to contest the validity of the patents under which defendants deraign title.

The tenth cause of action purports to be predicated upon the doctrine of Cramer v. United States, supra, 261 U.S. 219. In that case it was shown that for approximately seven years after 1853 Indians had lived upon 150 to 175 acres of land in the public domain in California which they had fenced, irrigated, cultivated and upon which they had erected houses and outbuildings. Their claim to a possessory interest therein was upheld as against that of the government's grantee of a larger parcel which included the Indian land but from which were excepted lands which had been "granted, sold, reserved, occupied by homestead settlers, or otherwise disposed of." (*Cramer*, supra, p. 225.) In holding that the land occupied by the Indians was land which had been "otherwise disposed of" within the meaning of the grant, the Supreme Court characterized the Indians' possession as "definite and substantial in

character and open to observation" at the time the subsequent grant was made. (*Cramer*, supra, at p. 230).[5]

The operative portion of the tenth cause of action in its entirety alleges: "After March 3, 1853, while Pitt River land was part of the public domain, plaintiff occupied it and acquired title under the principle enunciated in *Cramer v. United States*, 261 U.S. 219." The foregoing allegations, constituting no more than a conclusion of law, are demonstrably insufficient to tender an issue under the *Cramer* rule. Inasmuch as Tribe elected not to amend, we assume that it pleaded its strongest possible case. (Sierra Investment Corp. v. County of Sacramento (1967) 252 Cal. App.2d 339, 341.)

Tribe's eleventh cause of action is framed on the theory of adverse possession. The operative part thereof reveals an entire lack of ultimate facts essential to invoke the substantive right asserted. It is there alleged that "After March 3, 1853, plaintiff acquired title to Pitt River land by adverse possession." The allegation is no more than a conclusion of law, insufficient as a matter of law to state a cause of action. (See Code Civ. Proc., § 749.)

The foregoing discussion adequately disposes of the issues raised on this appeal. Other contentions raised by the defendants therefore do not require discussion.

The judgments are affirmed.

Puglia, P. J.

We concur:

Regan, J.

Janes, J.

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[5]The court held that the Indians were not barred by the Act of March 3, 1851, for failure to present a claim because their claim did not arise from the Spanish or Mexican governments and they were not occupying the lands in question when the Act was passed.

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SUPREME COURT, U. S.

In the

Supreme Court of the United States

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MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1975

No. 75-1286

PITT RIVER TRIBE OF INDIANS,

Petitioner,

vs.

PACIFIC GAS AND ELECTRIC COMPANY,
THE HEARST CORPORATION, KIMBERLY-CLARK CORPORATION,
PUBLISHERS FOREST PRODUCTS,
DIAMOND INTERNATIONAL COMPANY,
FRUIT GROWERS SUPPLY COMPANY,
U. S. PLYWOOD CORPORATION, *and*
SOUTHERN PACIFIC LAND COMPANY,

Respondents.

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BLEED THROUGH

IN THE

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OCTOBER TERM, 1975

No. 75-1286

PITT RIVER TRIBE OF INDIANS,
Petitioner,

vs.

PACIFIC GAS AND ELECTRIC COMPANY,
THE HEARST CORPORATION, KIMBERLY-CLARK CORPORATION,
PUBLISHERS FOREST PRODUCTS,
DIAMOND INTERNATIONAL COMPANY,
FRUIT GROWERS SUPPLY COMPANY,
U. S. PLYWOOD CORPORATION, *and*
SOUTHERN PACIFIC LAND COMPANY,
Respondents.

Opposition to Petition for a Writ of Certiorari

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The opposition of Respondents Pacific Gas and Electric Company, Publishers Forest Products, Southern Pacific Land Company, Diamond International Company, Kimberly-Clark Corporation, and Fruit Growers Supply Company, respectfully shows:

I

NATURE OF THE LITIGATION

Petitioner seeks review of a judgment of the Court of Appeal of the State of California, upholding judgments of

the Superior Court in Shasta County entered after Petitioner declined to further amend its complaints in the above entitled actions following the sustaining of demurrers with leave to amend. The California Supreme Court denied a hearing Pet. App. A,B,C and D).

In these actions Petitioner seeks to recover real property and to obtain other relief pertaining to the property, upon the allegation that "Pitt River Tribe of Indians, from time immemorial was and is the owner, and is seized and possessed, of certain land in Shasta, Modoc, Lassen and Siskiyou Counties, the boundaries of which are set out in Finding 25 of the Judgment of the Indian Claims Commission in *Pitt River Indians of California v. United States of America* (No. 347), reported at 7 *Indian Claims Commission Reports*, 815, 846-847." (Pet. App. A, pp 1-2). Respondents are alleged to be "large corporations which in total claimed ownership of at least 400,000 of the Tribe's 3½ million acres" (Pet. p 8).

II

PETITIONER HAS SHOWN NO VALID REASONS FOR THIS COURT TO GRANT A REVIEW ON WRIT OF CERTIORARI

The judgment of the California Court of Appeal is founded upon the law pertaining to the extinguishment of Indian title claims in California as enunciated by this Court in *Barker v. Harvey,* 181 U.S. 481, 21 S.Ct. 690, 45 L.Ed. 963 (1901), and in *United States v. Title Insurance & Trust Co.,* 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110 (1924) (Pet. App. C pp 6-8).

In the *Barker v. Harvey* and *United States v. Title Insurance & Trust Co.* cases this Court construed and applied the Act to Ascertain and Settle the Private Land Claims in the State of California, enacted March 3, 1851[1] to hold that

1. 9 U.S. Stat. 631 (Pet. App. E).

the Act was intended to give repose to titles as well as to fulfill treaty obligations and that Indian title claims not perfected under the Act were extinguished in 1853.

The judgment of the Court below is not only in conformity with *Barker v. Harvey* and *United States v. Title Insurance & Trust Co.*, but is in accord with the judgments of this Court and inferior federal courts in the following cases, among others: *Super, et al., v. Work*, 3 F2d 90 (D.C. 1925), affirmed 271 U.S. 643, 46 S.Ct. 481, 70 L.Ed. 1128; *Indians of California v. The United States*, 98 Court of Claims 583 (1942); *Pitt River Indians of California v. United States of America*, 7 Indian Claims Commission 815 (1959).

The judgment of the Court below is also in accord with the rule established by the California Supreme Court in *Thompson v. Doaksum*, 68 Cal. 593; 10 P. 199 (1886).

The judgment of the Court below is further based upon non-federal grounds of state statutes of limitations, laches, and rules of pleading and practice (Pet. App. C, pp 11-13).

The petition herein actually and simply seeks an opportunity to re-argue the matters argued, considered, and decided, in this Court, in the Title Insurance & Trust Co. case.

There may be some appeal in the argument that the California Indians were not fairly treated by the sovereign United States or by the State of California. But these actions seek to recover from private parties lands granted to their predecessors by the sovereign a hundred or more years ago. The claims of aboriginal Indian title asserted herein would pertain to a large part or all of the State of California, including lands both public and private, and ownerships both large and small. The construction of the Act of March 3, 1851 placed upon it by this Court and other courts has, over the years, become the foundation of Cali-

fornia titles. To reconsider the rule today would not only be an inappropriate remedy for this Petitioner, if Petitioner is entitled to some remedy, but would truly create a financial and political disaster.

The question is not one for which there is a judicial remedy, at least in the framework of these actions. It is a political question, to be decided by the legislative branch, and to be remedied, if a remedy is required, by legislative action. *Johnson v. M'Intosh,* 8 Wheat. 543 (1823), *Super v. Work,* 3 F 2d 90, affirmed, 271 U.S. 643, 46 S.Ct. 481, 70 L.Ed. 1128 (1925); *Buttz v. Northern Pacific Railroad Company,* 119 U.S. 55, 7 S.Ct. 100, 30 L.Ed. 330 (1886). The Congress has, in fact, acted on numerous occasions to aid, assist and compensate the Indians of California for loss of their historical lands and hunting grounds.[2]

III

PETITIONER'S CLAIMS OF A "CRAMER CAUSE OF ACTION" AN "1853 ACT CAUSE OF ACTION" AND A RIGHT TO AN EVIDENTIARY HEARING ARE INVALID.

In addition to re-arguing the historical background and purpose of the 1851 Act and the points made by the government in its brief in the Title Insurance & Trust Company case, Petitioner argues that it is entitled to relief upon the authority of *Cramer v. United States,* 261 U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622 (1923) (Pet. p 32). In the Cramer case

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2. Initially, specific areas of public domain were set apart by Executive Order as Indian reservations. See *Pitt River Indians of California v. United States,* 7 Ind. Cl. Com. 815, 852, disclosing the removal of Pitt River Indians to the Round Valley Reservation. In 1893, 1906 and 1908, Congress appropriated funds to purchase land for the use of Indians in California on reservations not suitable for cultivation or not on reservations. (27 Stat. 612 (1893); Stat. 1906, Ch. 3504; Stat. 1908, Ch. 153.) In 1910, 1911, 1912,

the Indians were individual occupants of land patented after 1853 pursuant to the 1866 Act (Railroad Grants). These Indian settlers had occupied, fenced, irrigated and cultivated the area in question prior to and at the time of the grant to the railroad. The Court recognized their rights as settlers acquired after 1853 and it afforded them rights similar to those which would have been accorded to white settlers under the same circumstances. The bases of the Cramer claim included individual occupancy and improvement of specifically described land, including fencing, irrigation, and cultivation, as well as the construction and maintenance of dwelling houses, prior to and at the time of the questioned railroad grant. This Court rejected the Indians' claims to lands which had not been so occupied, cultivated and fenced. Not only do the present cases deal with alleged tribal, rather than individual, rights, but the Petitioner was unable to allege any facts showing that it occupied, fenced, irrigated or cultivated any particular area or that it continued any

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1913, 1914 and 1925, Congress appropriated funds for purchase of land for landless Indians of California. (Stat. 1910, Ch. 140; Stat. 1911, Ch. 210; Stat. 1912, Ch. 388; Stat. 1913, Ch. 4; Stat. 1914, Ch. 222; 43 Stat. 1101 (1925).) In 1928 Congress conferred jurisdiction on the Court of Claims to determine claims for compensation by the Indians of California "by reason of lands taken from them . . . by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands . . . which the United States appropriated to its own purposes without the consent of said Indians" (Act of May 18, 1928. 25 U.S.C. 652, et seq.) (App. p 3).

Congress appropriated funds for the payment of these claims in 1945 (59 Stat. 77), 1946 (60 Stat. 348), 1955 (69 Stat. 460), and 1960 (74 Stat. 512).

In 1958, Congress provided for distribution of Rancheria lands among the Indian occupants, at their election. (72 Stat. 619).

In 1964 Congress appropriated funds specifically to compensate the Pitt River Indians for satisfaction of the judgment in *Pitt River Indians of California v. United States*, docket No. 347, supra (78 Stat. 1033) and, in 1968 Congress provided for reimbursement to individual Pitt River Indians (Act of September 21, 1968. 25 U.S.C. 659, et seq.) (App. p 5).

such possession. Conclusionary pleading as suggested on pages 32 and 33 of the Petition is not sufficient under California law. No doubt the Petitioner would have amended its complaint to allege such facts if it could. The judgment was based upon this insufficiency of the complaints to show any right to relief upon a *Cramer v. United States* theory (Pet. App. C, pp 10-13).

Petitioner also argues (Pet. pp 35-37) to the effect that it had a cause of action against respondents under Section 6 of the Act of March 3, 1853[3] "based upon the protection from preemption of land in the occupation or possession of any Indian Tribe." Petitioner places too much reliance on Section 6. The cases decided subsequent to 1853 and cited herein, dealing with the extinguishment of Indian title, hold that the land was placed in the public domain through operation of the *1851 Act*. The 1853 Act extended the survey system to California and authorized preemption and public sales. It is true that Section 6 provided that the act did not authorize preemption or settlement upon lands in the occupation or possession of an Indian tribe, but the restriction did not refer to sales or to issuance of patents pursuant to other statutory provisions,[4] and, it was removed entirely by the Act of June 2, 1862, Chap. 94 (App. p 1).

It is not alleged in the second amended complaint (Pet. App. A, pp 1-11) that respondents' patents were issued in violation of any of these Acts.

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3. Stats. 1853, Chap. 145. (Pet. App. F).

4. Act of April 24, 1820. 3 Stats. 566 (Sales of Public Lands); Act of May 20, 1862. 12 Stat. 392. (Homestead Acts); Act of December 29, 1916. 43 U.S.C. 291 (Stock-raising Homestead); Act of March 3, 1877. 43 U.S.C. 321 (Desert Land Entries); Act of June 3, 1878. 43 U.S.C. 311 (Timber and Stone Act); Act of March 3, 1873. 17 Stat. 605 (Timber Culture); Acts of March 3, 1863, 12 Stat. 754 and March 3, 1877, 19 Stat. 392 (Townsite Acts).

Petitioner also argues that the taking of "Pitt River land" violated the First, Fifth and Ninth Amendments to the Constitution and that it should have been granted a "Constitutional fact" hearing for that reason (Petn. p 31). But Petitioner does not allege any recognition by the Congress of its claimed rights to the land in question. The absolute power of the Congress to extinguish or otherwise deal with Indian title based upon aboriginal possession is not only implicit in the Barker v. Harvey, United States v. Title Insurance & Trust Co., and Super v. Work cases, but has been repeatedly recognized by this Court. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314 (1955).

IV

CONCLUSION

Any relief to which Petitioner may be entitled for any taking of ancestral lands should be sought in the legislative branch. Justice could not be served by invalidating titles to California lands granted into private ownership more than a century ago. The Petition shows no valid reason for this Court to review the judgment of the Court of Appeal and the Petition should be denied.

Dated: April 6, 1976

Respectfully submitted,

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Appendix

Act of June 2, 1862, Chap. 94

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the lands belonging to the United States to which the Indian title has been or shall be extinguished shall be subject to the operations of the preemption act of the fourth of September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned: Provided, however, That when unsurveyed lands are claimed by preemption, notice of the specific tracts claimed shall be filed within six months after the survey has been made in the field; and on failure to file such notice, or to pay for the tract claimed within twelve months from the filing of such notice, the parties claiming such lands shall forfeit all right thereto, provided said notices may be filed with the Surveyor General, and to be noted by him on the township plats, until other arrangements have been made by law for that purpose."

INDIANS OF CALIFORNIA
25 U.S.C.

§ 651. Definitions

For the purposes of sections 651-657 of this title the Indians of California shall be defined to be all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State. May 18, 1928, c. 624, § 1, 45 Stat. 602.

§ 652. Claims against United States for appropriated lands; submission to Court of Claims; appeal; grounds for relief

All claims of whatsoever nature the Indians of California as defined in section 651 of this title may have against

the United States by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in said State which the United States appropriated to its own purposes without the consent of said Indians, may be submitted to the Court of Claims by the attorney general of the State of California acting for and on behalf of said Indians for determination of the equitable amount due said Indians from the United States; and jurisdiction is conferred upon the Court of Claims of the United States, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all such equitable claims of said Indians against the United States and to render final decree thereon.

It is declared that the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief. May 18, 1928, c. 624, § 2, 45 Stat. 602.

§ 653. Statutes of limitations unavailable against claims; amount of decree; set-off

If any claim or claims be submitted to said courts, they shall settle the equitable rights therein, notwithstanding lapse of time or statutes of limitation or the fact that the said claim or claims have not been presented to any other tribunal, including the commission created by the Act of March 3, 1851 (Ninth Statutes at Large, page 631): *Provided,* That any decree for said Indians shall be for an amount equal to the just value of the compensation provided or proposed for the Indians in those certain eighteen unratified treaties executed by the chiefs and head men of the

several tribes and bands of Indians of California and submitted to the Senate of the United States by the President of the United States for ratification on the 1st day of June, 1852, including the lands described therein at $1.25 per acre. Any payment which may have been made by the United States or moneys heretofore or hereafter expended to date of award for the benefit of the Indians of California, made under specific appropriations for the support, education, health, and civilization of Indians in California, including purchases of land, shall not be pleaded as an estoppel but may be pleaded by way of set-off. May 18, 1928, c. 624, § 3, 45 Stat. 602.

§ 658. Distribution of $150 from fund to each enrolled Indian

Notwithstanding the provisions of section 656 of this title, the Secretary of the Interior, under such regulations as he may prescribe, is hereby authorized and directed to distribute per capita the sum of $150 to each Indian of California living on May 24, 1950, who is now or may hereafter be enrolled under sections 651 and 657 of this title. The Secretary of the Interior may, in his discretion, make such distribution from time to time to persons on the roll of the Indians of California approved on May 16, 1933, as he identifies such enrollees, before the completion of the revised roll provided for in section 651 of this title. The Secretary of the Interior is authorized to withdraw from the fund on deposit in the Treasury of the United States arising from the judgment in favor of the Indians of California entered by the Court of Claims on December 4, 1944, and appropriated for them by section 203 of the Act of April 25, 1945 (59 Stat. 77), such sums as may be necessary to make the

per capita payments required by this section, including not to exceed $15,000 for the purpose of defraying the expenses incident to carying out the provisions of sections 657 and 658 of this title. Such payments shall be made out of the accumulated interest on such judgment fund and so much of the principal thereof as is necessary to complete the payments. The money paid to enrollees pursuant to this section shall not be subject to any lien or claim of any nature against any of such persons, except for debts owing to the United States. May 24, 1950, c. 196, § 2, 64 Stat. 190.

§ 659. Distribution of judgment fund; preparation of Indian roll; applications for inclusion

(a) The Secretary of the Interior shall prepare a roll of persons of Indian blood who apply for inclusion thereon and (i) whose names or the name of a lineal or collateral relative appears on any of the approved rolls heretofore prepared pursuant to sections 651-657 of this title and the amendments thereto or (ii) who can establish, to the satisfaction of the Secretary, lineal or collateral relationship to an Indian who resided in California on June 1, 1852, and (iii) who were born on or before and were living on September 21, 1968.

(b) The roll so prepared shall indicate, as nearly as possible, the group or groups of Indians of California with which the ancestors of each enrollee were affiliated on June 1, 1852. If the affiliation of an enrollee's ancestors on that date is unknown, it shall be presumed to be the same as that of the ancestors' relatives whose affiliation is known unless there is sound reason to believe otherwise. Applicants whose ancestry is derived partly from one of the grounds named in section 660(b) of this title and partly from another group

of Indians in California shall elect the affiliation to be shown for them on the roll.

(c) Application for enrollment shall be filed with the Area Director of the Bureau of Indian Affairs, Sacramento, California, on forms prescribed for that purpose. Pub.L. 90-507, § 1, Sept. 21, 1968, 82 Stat. 860.

§ 660. Equal share distribution of 1964 appropriation

(a) The Secretary shall distribute to each person whose name appears on the roll prepared pursuant to section 659 of this title, except those whose ancestry is derived from one or more of the groups named in subsection (b) of this section, an equal share of the moneys which were appropriated by the Act of October 7, 1964 (78 Stat. 1033), in satisfaction of the judgment of the Indian Claims Commission in consolidated dockets numbered 31, 37, 80, 80-D, and 347, plus the interest earned thereon, minus attorneys fees, litigation expenses (including the reimbursement of funds expended under authority of the Acts of July 1, 1946 (60 Stat. 348), August 4, 1955 (69 Stat. 460), and July 14, 1960 (74 Stat. 512)), a proper share of the costs of roll preparation, and such amounts as may be required to effect the distribution.

(b) Persons whose ancestry is derived solely from one or more of the following groups and persons of mixed ancestry who elected to share, other than as heirs or legatees of enrollees, in any award granted to any of the following groups shall not share in the funds distributed pursuant to subsection (a) of this section: Northern Paiute, Southern Paiute, Mohave, Quechan (Yuma), Chemehuevi, Shoshone, Washoe, Klamath, Modoc, and Yahooskin Band of Snakes. Pub.L. 90-507, § 2, Sept. 21, 1968, 82 Stat. 860.

§ 661. Equal share distribution of undistributed balance of 1945 appropriation; credit to judgment account

(a) The Secretary shall distribute to each person whose name appears on the roll prepared pursuant to section 659 of this title regardless of group affiliation an equal share of the undistributed balance of the moneys appropriated in satisfaction of the judgment of the Court of Claims in the case of The Indians of California against United States (102 Court of Claims 837; 59 Stat. 94), plus the interest earned thereon, including the reimbursed moneys and unexpended balances of the funds established by the Acts of July 1, 1946 (60 Stat. 348), August 4, 1955 (69 Stat. 460), and July 14, 1960 (74 Stat. 512), minus a proper share of the costs of roll preparation and such amounts as may be necessary to effect the distribution.

(b) The Secretary of the Treasury is authorized and directed to credit to the judgment account referred to in subsection (a) of this section, for distribution as a part of such account, the sum of $83,275, plus interest at 4 per centum per annum from December 4, 1944, which sum represents the value of sixty-six thousand six hundred and twenty acres of land erroneously used as an offset against said judgment.

Pub.L. 90-507, § 3, Sept. 21, 1968, 82 Stat. 860, amended Pub. L. 91-64, Aug. 25, 1969, 83 Stat. 105.

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1286

PITT RIVER TRIBE OF INDIANS,

Petitioner,

vs.

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent The Hearst Corporation respectfully submits the following brief in opposition to the within Petition for a Writ of Certiorari:

I

STATEMENT OF THE CASE.

The current Complaint herein, the Second Amended Complaint, was filed on behalf of a legally undefined entity, the Pitt River Tribe of Indians, and essentially sought the recovery of vast areas of certain real property located in the State of California, including property to which title has rested in The Hearst Corporation for decades. Other private corporations, also owning real property in the same area, were made parties

to this matter by the filing of substantially identical complaints.

The current pleading against The Hearst Corporation contains fourteen purported causes of action, most of which are based upon a claim that the Pitt River Tribe of Indians retained some right of permanent occupancy in California lands. Petitioner now estimates this to be a total of 3½ million acres, of which at least 500,000 acres are directly involved in this action (Pet., p. 8). Other than the ninth and tenth purported causes of action, petitioner no longer asserts any cause of action not based on an alleged right of occupancy. The ninth cause of action seeks to attack patents on land issued to respondent's predecessors, while the tenth cause of action alleges a right in land "under the principle enunciated in *Cramer v. United States,* 261 U.S. 219."

The trial court ruled on general and special demurrers filed by The Hearst Corporation and the other respondents herein that any right of tribal occupancy had been extinguished by petitioner's failure to comply with the Private Land Claims Act of 1851 (9 Stat. 631) (hereinafter referred to as the "Act of 1851"). The court also ruled that each cause of action was barred by applicable California statutes of limitations, by laches, and by the fact that prior proceedings by the petitioner before the Indian Claims Commission were *res judicata,* thereby preventing recovery herein. The trial court further found that the matters asserted in the current pleading were nonjusticiable, and therefore subject only to legislative action.

On appeal, the California Court of Appeal affirmed, specifically holding that any asserted right to tribal occupancy had been extinguished by petitioner's failure

to comply with the Act of 1851 (Pet. App. C, pp. C-7, 8), and that the petitioner's ninth and tenth causes of action were deficient (Pet. App. C, pp. C-8-13). The California Supreme Court denied petitioner's petition for a hearing by that court.

II
ARGUMENT.

A. Petitioner Has Exhibited No Important Question of Federal Law, as This Court Has Held That Indian Right of Occupancy Has Been Extinguished by Failure to Comply With the Private Land Claims Act of 1851.

The judgment of the California Court of Appeal is properly based upon the law establishing the extinguishment of Indian title claims in California as clearly enunciated by this Court in *Barker v. Harvey*, 181 U.S. 481 (1901), and in *United States v. Title Insurance and Trust Company*, 265 U.S. 472 (1924).

In *Barker v. Harvey*, this Court was presented with a factual situation in which plaintiffs claimed title by virtue of a patent confirmed by the Mexican government. Defendants, so-called "Mission Indians," claimed as a defense a right of permanent occupancy by virtue of alleged occupation of the premises prior to the Mexican grant and before any dominion was acquired by Mexico over the territory.

In discussing the purpose and intent of the Act of 1851, this Court cited with approval the following language in *Thompson v. Los Angeles Farming and Mill Co.*, 180 U.S. 72 (1901):

> "Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made

> complete and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to give repose to titles. It was enacted not only to fulfill our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted but required all claims to be presented to the board, and barred all from future assertion which were not presented within two years after the date of the act." 180 U.S. 77.

In rejecting any right to title in the "Mission Indians," this Court in *Barker* stated as follows:

> "If these Indians had any claims founded on the actions of the Mexican government they abandoned them by not presenting them to the commission for consideration, and they could not, therefore, . . . 'resist successfully any action of the government in disposing of the property.' If it be said that the Indians do not claim the fee, but only the right of occupation, and therefore they do not come within the provision of Section 8 as persons 'claiming land in California by virtue of any right or title derived from the Spanish or Mexican government,' it may be replied that a claim of a right to permanent occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States." 181 U.S. 491.

In *United States v. Title Insurance and Trust Company*, 265 U.S. 472 (1924), this Court was presented

with a suit by the United States as guardian to the "Mission Indians" to quiet in them a "perpetual right" to occupy, use, and enjoy part of a confirmed Mexican land grant in California, for which defendants held a patent from the United States. The Indians never presented a claim pursuant to the Act of 1851 to the Commission, nor did the United States do so for them. The Court discussed at some length its opinion rendered in *Barker*, and noted the following with respect to that decision:

> "This court, after observing that, under the treaty with Mexico and the rules of international law, the United States was bound to respect the rights of private property in the ceded territory, said there could be no doubt of the power of the United States, consistently with such obligation, to provide reasonable means for determining the validity of all titles within the ceded territory, to require all claims to lands therein to be presented for examination, and to declare that all not presented should be regarded as abandoned." 265 U.S. 483.

This Court in *Title Insurance* determined that the decision in *Barker* "has become a rule of property," stating in relevant part as follows:

> "The question whether the decision [*Barker*] shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago, and affected many tracts of land in California, particularly in the southern part of the state. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on

> the decision. The defendants in this case purchased fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with any injurious results. Besides, the government and the scattered Mission Indians have adjusted their situation to it in several instances. As long ago as *Minnesota Min. Co. v. National Min. Co.* 3 Wall. 332, 18 L.ed. 42, this court said (p. 334): 'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their lives, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective, and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change." 265 U.S. 486.

Similarly, in the case of *Super v. Work*, 3 F.2d 90 (1925), the rights of Indians asserted in that matter differed from those in *Barker, supra*, and *Title Insurance, supra*, "only to the extent that in those cases they were Mission Indians, while in the present case, at and prior to the cession by Mexico, the plaintiff Indians were merely roving bands" (3 F.2d 91). The Court of Appeals in *Super* concluded that the failure of the Indians to present their claims pursuant to the procedure of the Act of 1851 at the proper

time resulted in fatal abandonment of any right in said property, and this Court affirmed *per curiam,* citing both *Barker* and *Title Insurance.*

Accordingly, any question on the subject of extinguishment of Indian title has been decided long ago by this Court and petitioner cannot now ask to disturb the holding of those cases.

B. The Issues Sought to Be Raised by Petitioner Herein Present Political and Nonjusticiable Issues.

The issues sought to be raised by petitioner herein are solely within the jurisdiction and purview of the legislative branch and are not reviewable by the courts.

The issue of aboriginal or Indian title is a question uniquely within the province of Congress and not open to review by the courts. The extinguishment of Indian title has been repeatedly stated to be a political and nonjusticiable issue. The rule was first stated by Chief Justice Marshall in the case of *Johnson v. M'Intosh,* 8 Wheat. 586:

> "The exclusive right of the United States to extinguish Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the rights of occupancy, or otherwise, its justness is not open to inquiry in the courts."

Similarly, this Court in the case of *United States v. Santa Fe Pacific Railroad Company,* 314 U.S. 399 (1941) stated as follows at page 347:

> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguish-

ment raise political not justiciable issues (citations omitted)." See also, *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272.

Finally, the court in *Super v. Work, supra,* 3 F.2d 90 (1925), stated as follows:

> "Congress at all times exercises plenary authority over the tribal relations of Indians. The power thus exercised is in its nature political, and not judicial. It has accordingly been held not to be subject to the control of the judicial department of the government. The power of Congress is so absolute that it may abrogate even the provisions of an Indian treaty, which authority arises from its paramount power over the property of Indians by reason of its exercise of guardianship. Congress may in the exercise of this power determine the rights of Indians to the occupancy of lands, and, if injury occurs, the relief must be sought from Congress, and not from the courts. (citation omitted)." 3 F.2d 91.

Accordingly, the issues raised regarding "Indian title", Constitutional violations, and petitioner's request for an "evidentiary hearing" are not capable of judicial remedy, but are rather political questions to be entertained by the legislative branch, if at all.

C. Petitioner Cannot Claim Any Right or Interest in the Subject Real Property Under the Decision in Cramer v. U.S.

Petitioner has contended throughout the appellate proceedings, and in its petition herein, that the decision in *Cramer v. U.S.* (1923) 261 U.S. 219, affords some basis of relief. Such an interpretation of *Cramer* is

a total misapplication of the case, as there is no similarity whatsoever between the allegations contained in Petitioner's Second Amended Complaint and the facts upon which the *Cramer* decision is based.

Specifically, *Cramer* was a suit originally brought by the United States Government, acting in behalf of certain Northern California Indians, to cancel a land patent issued to defendants' predecessor. The patent was issued in 1866, but it excepted from the grant such land as "shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of." The Indians were found to have occupied the land in question continuously since before 1859. They had fenced 150-175 acres, a portion of which was irrigated and cultivated. In addition, they had constructed dwellings on the land.

This Court in *Cramer* allowed these individual Indians to retain possession of public lands against the claimants on the basis of the foregoing facts, as well as a conclusion that the Act of 1851 did not bar those particular Indians' rights because their claims were not derived from the Spanish or Mexican Governments and "moreover it does not appear that these Indians were occupying the lands in question when the Act was passed." (261 U.S. at 231). Their occupation of the land was in the nature of homesteading, but because the homestead privilege was not extended to Indians until the Act of March 3, 1875 and the Indians in *Cramer* settled on the land in about 1859, this Court based its findings on a basic federal policy to respect the Indian right of occupancy, and stated as follows:

> "The action of these individual Indians in abandoning their nomadic habits and attaching them-

> selves to a definite locality, reclaiming, cultivating, and improving the soil and establishing fixed homes thereon, was in harmony with the well-understood desire of the government which we have mentioned. To hold that, by so doing, they acquired no possessory rights to which the government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation" 261 U.S. 228-229.

This Court held that the Indians had a right only to the land which was actually enclosed, and that this right did not extend beyond the limits of actual occupancy. Such a decision, and the basis on which the decision rests as discussed above, gives no support whatsoever to any claim of a right to the property which is the subject of this lawsuit by petitioner.

In this action, the United States is not a party, petitioner did reside on the land they now seek at the time of the Act of 1851, and that Act did apply to petitioner. In this action, there was no allegation of facts establishing a right similar to that of homesteading in that petitioner did not allege ownership, occupancy, or a description of specific property which it claims, did not allege fencing of any particular area, or that there was any cultivation or irrigation of the property, or that dwellings were placed upon the property. It should furthermore be noted that in *Cramer* this Court only allowed a right of occupancy as to that portion of the property which was continuously, openly and observably possessed by the Indians subsequent to the Act of 1851. It is clear that the *Cramer* decision is no support for any right or interest asserted by petitioner in this action.

The operative allegations of petitioner's tenth cause of action regarding the so-called "Cramer theory" merely alleges that,

> "After March 3, 1853, while Pitt River land was part of the public domain plaintiff occupied it and acquired title under principle enunciated in *Cramer v. United States*, 261 U.S. 219." (Pet. App. A, pp. A-7, 8).

Under California law, Petitioner is presumed to have pleaded its strongest possible case (*Sierra Investment Corp. v. County of Sacramento* (1967) 252 Cal. App. 2d 339, 341), and it is submitted that the California Court of Appeal was clearly correct in finding this allegation to be insufficient as a mere conclusion of law (Pet. App. C, p. C-12).

D. Petitioner Has No Standing to Attack Patents Issued to Respondent's Predecessors.

In its purported ninth cause of action, petitioner sought to challenge patents issued to respondent's predecessors. It is established that, even if there may have been error in the issuance of a patent, a stranger with no interest in the land cannot maintain an action to challenge the patent (*Burke v. Southern Pacific R.R. Co.* (1913) 234 U.S. 669, 692-693; *Lee v. Johnson* (1885) 116 U.S. 48, 49-50; *Bohall v. Dilla* (1884) 114 U.S. 47, 50-51). Petitioner did not allege title to, ownership of, or any other right in the land prior to the issuance of the patents which it sought to challenge. Regardless, in view of the decisions of this Court discussed above, it could not have done so. Accordingly, it had no standing to challenge the patents, and none of the cases cited by petitioner is to the contrary.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated: April 19, 1976.

Respectfully submitted,

PHILIP M. BATTAGLIA,

Attorney for Respondent
The Hearst Corporation.

FLINT & MACKAY,
Of Counsel.

APPENDIX.

Act of June 2, 1862, Chap. 94.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the lands belonging to the United States to which the Indian title has been or shall be extinguished shall be subject to the operations of the preemption act of the fourth of September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned: Provided, however, That when unsurveyed lands are claimed by preemption, notice of the specific tracts claimed shall be filed within six months after the survey has been made in the field; and on failure to file such notice, or to pay for the tract claimed within twelve months from the filing of such notice, the parties claiming such lands shall forfeit all right thereto, provided said notices may be filed with the Surveyor General, and to be noted by him on the township plats, until other arrangements have been made by law for that purpose."

Indians of California
25 U.S.C.

§ 651. Definitions

For the purposes of sections 651-657 of this title the Indians of California shall be defined to be all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State. May 18, 1928, c. 624, § 1, 45 Stat. 602.

§ 652. Claims against United States for appropriated lands; submission to Court of Claims; appeal; grounds for relief

All claims of whatsoever nature the Indians of California as defined in section 651 of this title may have against the United States by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in said State which the United States appropriated to its own purposes without the consent of said Indians, may be submitted to the Court of Claims by the attorney general of the State of California acting for and on behalf of said Indians for determination of the equitable amount due said Indians from the United States; and jurisdiction is conferred upon the Court of Claims of the United States, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all such equitable claims of said Indians against the United States and to render final decree thereon.

It is declared that the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief. May 18, 1928, c. 624, § 2, 45 Stat. 602.

§ 653. Statutes of limitations unavailable against claims; amount of decree; set-off

If any claim or claims be submitted to said courts, they shall settle the equitable rights therein, notwithstanding lapse of time or statutes of limitation or the fact that the said claim or claims have not been

presented to any other tribunal, including the commission created by the Act of March 3, 1851 (Ninth Statutes at Large, page 631): *Provided,* That any decree for said Indians shall be for an amount equal to the just value of the compensation provided or proposed for the Indians in those certain eighteen unratified treaties executed by the chiefs and head men of the several tribes and bands of Indians of California and submitted to the Senate of the United States by the President of the United States for ratification on the 1st day of June, 1852, including the lands described therein at $1.25 per acre. Any payment which may have been made by the United States or moneys heretofore or hereafter expended to date of award for the benefit of the Indians of California, made under specific appropriations for the support, education, health, and civilization of Indians in California, including purchases of land, shall not be pleaded as an estoppel but may be pleaded by way of set-off. May 18, 1928, c. 624, § 3, 45 Stat. 602.

§ 658. Distribution of $150 from fund to each enrolled Indian

Notwithstanding the provisions of section 656 of this title, the Secretary of the Interior, under such regulations as he may prescribe, is hereby authorized and directed to distribute per capita the sum of $150 to each Indian of California living on May 24, 1950, who is now or may hereafter be enrolled under sections 651 and 657 of this title. The Secretary of the Interior may, in his discretion, make such distribution from time to time to persons on the roll of the Indians of California approved on May 16, 1933, as he identifies such enrollees, before the completion of the revised

roll provided for in section 651 of this title. The Secretary of the Interior is authorized to withdraw from the fund on deposit in the Treasury of the United States arising from the judgment in favor of the Indians of California entered by the Court of Claims on December 4, 1944, and appropriated for them by section 203 of the Act of April 25, 1945 (59 Stat. 77), such sums as may be necessary to make the per capita payments required by this section, including not to exceed $15,000 for the purpose of defraying the expenses incident to carrying out the provisions of sections 657 and 658 of this title. Such payments shall be made out of the accumulated interest on such judgment fund and so much of the principal thereof as is necessary to complete the payments. The money paid to enrollees pursuant to this section shall not be subject to any lien or claim of any nature against any of such persons, except for debts owing to the United States. May 24, 1950, c. 196, § 2, 64 Stat. 190.

§ 659. Distribution of judgment fund; preparation of Indian roll; applications for inclusion

(a) The Secretary of the Interior shall prepare a roll of persons of Indian blood who apply for inclusion thereon and (i) whose names or the name of a lineal or collateral relative appears on any of the approved rolls heretofore prepared pursuant to sections 651-657 of this title and the amendments thereto or (ii) who can establish, to the satisfaction of the Secretary, lineal or collateral relationship to an Indian who resided in California on June 1, 1852, and (iii) who were born on or before and were living on September 21, 1968.

(b) The roll so prepared shall indicate, as nearly as possible, the group or groups of Indians of California with which the ancestors of each enrollee were affiliated on June 1, 1852. If the affiliation of an enrollee's ancestors on that date is unknown, it shall be presumed to be the same as that of the ancestors' relatives whose affiliation is known unless there is sound reason to believe otherwise. Applicants whose ancestry is derived partly from one of the grounds named in section 660(b) of this title and partly from another group of Indians in California shall elect the affiliation to be shown for them on the roll.

(c) Application for enrollment shall be filed with the Area Director of the Bureau of Indian Affairs, Sacramento, California, on forms prescribed for that purpose. Pub.L. 90-507, § 1, Sept. 21, 1968, 82 Stat. 860.

§ 660. Equal share distribution of 1964 appropriation

(a) The Secretary shall distribute to each person whose name appears on the roll prepared pursuant to section 659 of this title, except those whose ancestry is derived from one or more of the groups named in subsection (b) of this section, an equal share of the moneys which were appropriated by the Act of October 7, 1964 (78 Stat. 1033), in satisfaction of the judgment of the Indian Claims Commission in consolidated dockets numbered 31, 37, 80, 80-D, and 347, plus the interest earned thereon, minus attorneys fees, litigation expenses (including the reimbursement of funds expended under authority of the Acts of July 1, 1946 (60 Stat. 348), August 4, 1955 (69 Stat. 460), and July 14, 1960 (74 Stat. 512)), a

proper share of the costs of roll preparation, and such amounts as may be required to effect the distribution

(b) Persons whose ancestry is derived solely from one or more of the following groups and persons of mixed ancestry who elected to share, other than as heirs or legatees of enrollees, in any award granted to any of the following groups shall not share in the funds distributed pursuant to subsection (a) of this section: Northern Paiute, Southern Paiute, Mohave, Quechan (Yuma), Chemehuevi, Shoshone, Washoe, Klamath, Modoc, and Yahooskin Band of Snakes. Pub. L. 90-507, § 2, Sept. 21, 1968, 82 Stat. 860.

§ 661. Equal share distribution of undistributed balance of 1945 appropriation; credit to judgment account

(a) The Secretary shall distribute to each person whose name appears on the roll prepared pursuant to section 659 of this title regardless of group affiliation an equal share of the undistributed balance of the moneys appropriated in satisfaction of the judgment of the Court of Claims in the case of The Indians of California against United States (102 Court of Claims 837; 59 Stat. 94), plus the interest earned thereon, including the reimbursed moneys and unexpended balances of the funds established by the Acts of July 1, 1946 (60 Stat. 348), August 4, 1955 (69 Stat. 460), and July 14, 1960 (74 Stat. 512), minus a proper share of the costs of roll preparation

and such amounts as may be necessary to effect the distribution.

(b) The Secretary of the Treasury is authorized and directed to credit to the judgment account referred to in subsection (a) of this section, for distribution as a part of such account, the sum of $83,275, plus interest at 4 per centum per annum from December 4, 1944, which sum represents the value of sixty-six thousand six hundred and twenty acres of land erroneously used as an offset against said judgment.

SUPREME COURT, U. S.
MAY 11 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 75-1286

PITT RIVER TRIBE OF INDIANS,

Petitioner,

v.

PACIFIC GAS AND ELECTRIC COMPANY, THE HEARST CORPORATION, KIMBERLY-CLARK CORPORATION, PUBLISHERS FOREST PRODUCTS, DIAMOND INTERNATIONAL COMPANY, FRUIT GROWERS SUPPLY COMPANY, U. S. PLYWOOD CORPORATION, and SOUTHERN PACIFIC LAND COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

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Attorney for Petitioner

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PETITIONER'S REPLY BRIEF

Appellees have filed three Opposition Briefs. We will reply to them jointly.

On the 1851 Act

We point out that the Opposition utterly fails to reply to our facts and argument establishing that Congress did not intend, or even contemplate, any extinguishment of Indian Title except in the Section 16 situations.

They would have the Court believe that the Barker and Title Insurance courts were indifferent or hostile to Congress' intention.

They ignore the precise language of Cramer adopting the specific argumentation of the Solicitor General that Indian Title was not extinguished if the Indians in that case were on the land in 1851-1853.

So they offer no reconciliation of Barker, Title Insurance and Cramer because on their theory no reconciliation is possible.

They ignore the argumentation of the Solicitor General in Title Insurance and Cramer which of course is still relevant in a non-Section 16 situation.

None of the briefs spells out its argumentation, but they do introduce some elements which we will assume were intended as support of their position.

They refer to Super v. Work which adds

nothing to the basic argument on extinguishment of title, for three reasons. Number one is the ambiguous authority of a per curiam decision without evidence of the Court's thought processes or documentation. Number two is the very inadequate briefing by appellant in that case. Outside of the contention that Barker and Title Insurance were wrong and should be overruled, the only argument by appellant was that its claim was tribal and the claims in Barker and Title Insurance were not. Number three is the inability to reconcile Super with either Cramer or the demonstrated Congressional intent.

The next element which, presumably, is intended to oppose our contentions is what has been called the "rule of property". For this "rule" Title Insurance is quoted. Title Insurance in turn quotes from Minnesota Mining v. National Mining, 3 Wall. 332 and the quotation shows its irrelevancy

to our case. In Title Insurance the Government was, and in our case we are not, attempting to persuade this Court to "vacillate and overrule their own decisions". And when we read the facts of Minnesota Mining it is crystal clear that this doctrine has no application. Minnesota Mining did not involve a different factual situation which, it was claimed, required a different ruling. It involved the identical situation and even the same parties. So the "rule of property" is not a means by which the Supreme Court ties itself down to formulas and generalizations. It is simply stare decisis with a modern name.

The next element which, presumably, is intended to oppose our contentions is the extinguishment by the sword doctrine (citing Johnson v. McIntosh). We submit this is irrelevant since we do not contend that Congress intended by this guise (1851 Act) to extinguish Indian Title. Furthermore,

we wonder why, especially in this Bicentennial year, it is necessary to continue the rhetoric of "we could take Indian land by the sword but we do not intend to". Relations between Indians and the Government, and the image of the Government, might be improved if we stopped flaunting our strength especially in a discussion of whether the Government has kept its word.

The final element which, presumably, is intended to oppose our contentions is an itemization of the "largesse" of the Congress in dealing with California Indians. Since they go outside the record (and even the logic) why should we not - in order to make a necessary correction?

Reservations have been created in California constituting about 5% of the land and consisting according to all Government reports of almost worthless land - so that most of the eligible Indians cannot or will not live on it.

And for a California which at the time was considered the most fertile land on the continent and which included a billion and a half dollars in gold, individual California Indians received 47 cents an acre. When reduced by the ineligibles on the roll and further reduced because of their large land area per Indian, appellant's members (the very few who were willing to accept the money) were paid off at the rate of about 10 cents an acre. In any event, how does this prove that Congress intended in 1851 to extinguish Indian Title?

Appellees do not deign to mention our legal argument that extinguishment for failure to file a claim cannot take place if claim filing was prevented by fraud and violence. They do mention it as a political argument and refer appellant to Congress for redress.

Is this Indian law? Anything goes? Whether Congress so intended, or not?

If so we had better be frightened? Felix Cohen, the great Indian law scholar (so described in two Supreme Court opinions) said that the rights of the Indian are like the miner's candle for the rest of us.

This brings us naturally to our contention that even if Congress intended the extinguishment of Indian Title in California and even though, as an abstraction, Congress has power to do so, this does not mean that there is no constitutional limitation to the exercise of the power in an individual case. The demand we made for a "constitutional fact" hearing demonstrates that this is that case, if there be any. Even if there is doubt of the existence of constitutional limitations, is there not sufficient possibility so as to require an avoidance of the constitutional challenge by the contended-for interpretation of the 1851 Act.

Appellees meet the constitutional challenge in two ways. One is to refer appellants to Congress (as if that were the approved forum for interpreting the Constitution). The other is a reference to Tee-Hit Ton; but all that decision held was the non-requirement of compensation in the taking of Indian title. The Court limited its ruling by this statement:

> "This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force." (348 U.S. 273)

Appellants are not litigating for compensation, but for their land.

One of the Appellees' briefs attempts to intimidate the Court with the threat that a ruling in Appellants' favor "would truly create a financial and political disaster". Let us analyze this. The first thing they are saying is that the Court should dishonestly overrule the Indians' contention solely because of financial

embarrassment to corporations or the government. If Appellant's position is not legally sound this argument could not logically be made and would not have to be made.

After saying many times over that Congress can take away Indian land without their consent, are they now going to deny that Congress would have the power (or the statesmanship) to deal with the results of a decision favorable to Appellant?

In any event Appellant would have several obstacles to overcome in the trial court. This is pointed out in the Government's brief in Title Insurance:

> "The disastrous effect on titles anticipated as the result of a reversal is imaginary.
>
> This of course is entirely outside the record. But, even if it were relevant, a case like this, where Indian possession continues in the spot where it has immemorially existed is one in a thousand. California Indians, where not on reservations, are scattered hither and yon and buffeted from

> pillar to post, and the instances where it would be possible to prove long-continued possession, or to negative the idea of abandonment are few indeed."

The Cramer Cause of Action

Appellees claim Appellants are not entitled to a trial because they did not allege certain specifics such as buildings, fences, agriculture, etc., that they claim are required to take advantage of the type of property or cause of action created by this Court's decision in Cramer v. United States, 261 U.S. 219. As we pointed out in our Petition,we did not allege these specifics because they might or might not apply to the many separate Cramer claims involved in this litigation. Furthermore we do not have Appellees' crystal ball. All we can do is read Cramer carefully and thoughtfully. Let us see what Cramer has to say on the subject.

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> "Here the claim for the Indians is based on occupancy alone, and the extent of it is clearly fixed by the enclosure, cultivation and improvements. The evidence does not disclose any act of dominion on their part over, or any claim or assertion of right to, any lands beyond the limits of their actual possessions as thus defined. Under the circumstances, their rights are confined to the limits of actual occupancy and cannot be extended to other lands never possessed or claimed, simply because they form part of the same legal subdivisions."

Is not the Cramer Court clearly saying that the right of the Indians depends upon the "occupancy", whereas the evidentiary facts (inclosure, cultivation and improvements) are proof of the occupancy and of the specific area occupied? Could we not have alleged a Cramer-type property right by simply alleging"occupancy"? We went further, and also alleged whatever (if anything) is contained in the "principle enunciated in Cramer v. United States, 261 U.S. 219."

On at least one occasion this Court has spoken out against the theory that in order

to be entitled to a trial a plaintiff must allege the specific facts of the specific case. In United States v. Employing Plasterers, 347 U.S. 186, 188 the Court says:

> "And the court held that there was no allegation of fact which showed that these powerful local restaurants had a sufficiently adverse effect on the flow of plastering materials into Illinois. At this point we disagree. The complaint plainly charged several times that the effect of all these local restaurants was to restrain interstate commerce. Whether these charges be called "allegations of fact" or "mere conclusions of the pleader", we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried..."
>
> "We hold it was error to dismiss the Government's complaint for failure to state a cause of action."

It is clear from the foregoing that the Court of Appeals erred in (a) its definition of, and (b) the required method of pleading, the Federal right established by Cramer. (Pet. App. pg. C-12)

The discussion of this point not only establishes the incorrectness of the ruling below, it also demonstrates why the Petition for Certiorari should be granted on this point. It is perhaps because of the ambiguity of Cramer-type title that so little advantage has been taken of it by Indians; shepardizing discloses only one case (Navaho Tribe v. Utah, 72 Interior Decisions 361).

1853 Act Cause of Action

One of the opposing briefs (Diamond International, et al.) claims that the 1853 Act has been repealed and it offers (in its appendix) the Act of June 2, 1862 to prove it. The logic of the repeal argument eludes us, for all the 1862 Act does is to make the 1841 Act (5 Stat 453) applicable to all lands belonging to the United States to which Indian Title has been extinguished. How does this repeal the 1853 Act, expecially since the 1853 Act incorporates the 1841 Act (Pet. App. pg F-9)?

The other argument made by Appellees is that Appellant cannot challenge their patents because it is a stranger. They cite three cases, and we accept the proposition they stand for, that a stranger is one who had no interest in the land at the time the patent issued. Quoting from their own case, Burke v. Southern Pacific, 234 U.S. 669, 692:

> "cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it."

One of the cases cited by Burke illustrates what this means:

> "a patent is unassailable by any title commenced after its emanation." Hofnagle v. Anderson, 20 U.S. 212, 217

Another of their cases puts it this way:

> "It is for the party whose rights are alleged to have been disregarded that relief is sought." Lee v. Johnson, 116 U.S. 48,50

The beneficiary of a statutory reservation of land for his or its use can obviously go to court to protect against a contradictory, and therefore invalid, patent. See Kissell v. Board of President, 59 U.S. 19.

Conclusion

The Petition for Certiorari should be granted.

Respectfully submitted

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